MISSISSIPPI LAW JOURNAL

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TAXATION—UNINCORPORATED ASSOCIATIONS AND THE MEDICAL PROFESSION

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Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, under the Act of Congress of March 3, 1879.

Published in October, December, March, and May

$4.00 Per Annum **$1.50 per Current Number**

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
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VOLUME XXX MAY, 1959 NUMBER 3

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Mississippi Law Journal

VOLUME XXX MAY, 1959 NUMBER 3

FUTURE INTERESTS—THE MISSISSIPPI TWO DONEE STATUTE AND THE COMMON LAW RULE AGAINST PERPETUITIES

Arthur B. Custy† *and Jack W. Brand*††

The application and purposes of the almost defunct two donee statute, the predecessor of Section 838 of the Mississippi Code, has confounded the courts and lawyers of this State since its inception in 1822.[1] It has been called "odd and confused"[2] by no less an authority than Mr. Gray. Indeed its application has by no means followed a constant pattern since its enactment. This statute has been referred to by the Supreme Court of Mississippi as "our rule against perpetuities."[3] A statement of this nature raises the issues of whether or not the two donee statute abrogated, amended or in any manner affected the common law rule against perpetuities as it presently exists in this country, and, if so, to what extent. Hence, any treatment of the subject of perpetuities in Mississippi must, necessarily, involve a discussion of the two donee statute and the common law rule as they are applied to the cases.

The two donee statute has been criticized by almost everyone who has crossed its path as be-clouding the issues of perpetuities needlessly, since the common law rule is sufficient to prevent the evils for which the doctrine was instituted. But it must be remembered that many difficulties accompany the application of the common law rule as the many volumes devoted to the subject will attest.

During the post-revolutionary period it was thought that the Eng-

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[1]"Every estate in lands or slaves, which now is or shall hereafter be created an estate in fee-tail, shall be an estate in fee simple; and the same shall be discharged of the conditions annexed thereto by the common law. restraining alienations before the donee shall have issue, so that the donee, or person in whom the conditional fee is vested, or shall vest, shall have the same power over the said estates, as if they were pure and absolute fees; Provided, That any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-man, and in default thereof, to the right heirs of the donor in fee simple." Miss. Code Rev. ch. 42, Art. 1 (24) (1848).

[2]Gray, The Rule Againt Perpetuities, § 746, n. 1 (4th ed. 1942).

[3]Henry v. Henderson, 103 Miss. 48 at 69, 60 So. 33 (1912).

lish rules regarding restraints on alienation and related subjects were unsuited to the spirit of republican institutions. Therefore, many States abolished the fee tail, but continued to permit limitations within the mechanical limits of the common law rule against perpetuities.[4] It was in an attempt to make these subjects "plain and intelligible"[5] that the Mississippi Legislature, in 1822, passed an act concerning conveyances which included the predecessor of the two donee statute[6] and the present statute on this subject.[7] It would be an understatement to say that these statutes did not accomplish their purpose. This area of the law has never been firmly settled in Mississippi. The Court has been content to decide each issue as it was presented and has not answered conclusively many of the questions raised concerning the construction to be placed on the statute. This situation has given rise to conflicting opinions concerning the statute and the common law rule. However, recent decisions have thrown light into several hitherto unexplored areas, and it is believed that some guiding principles may be gleaned from an examination of the cases. It is believed that these recent cases as compared to other decisions lead one to the conclusion that the statutory rule and the common law rule against perpetuities exist side by side in Mississippi today. That is to say, a conveyance or devise must not conflict with either rule.

This discussion of the statutory rule will be divided into three parts, since the legislature saw fit to amend the statute on two occasions.[8] Each part will contain a discussion of the cases arising under the particular version of the statute then in force. Lest one is inclined to believe that the two donee statute has lost its vitality since it was amended in 1930,[9] it is well to remember that wills written in the period prior to 1930 are being probated today and are construed under the statute then in force.[10]

1822 - 1857

The statute as it existed during the period from 1822 to 1857 contained no two donee provision, but allowed a conveyance or devise of *lands* to any number of donees, then living, with limitation over to the heirs of the body of the remainder-man, or in default thereof, to the right heirs of the donor in fee simple.[11] Of course it is apparent from

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[4]George's Mississippi Digest, Limitation of Estates, p. 493 (1872).
[5]Ibid.
[6]See note 23 infra.
[7]Miss. Code Ann. § 838 (1942).
[8]The statute was amended to include the two donee provision in 1857. Miss. Code Rev. ch. 36, art. 3 (1857). The statute was again amended in 1930 to exclude the two donee provision. Miss. Code Ann. § 838 (1942).
[9]Miss. Code Ann. § 838 (1942).
[10]Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957).
[11]See note 1 supra.

a reading of the proviso that it does not apply to personal property. It was so held in an early case.[12]

> "By reference to section 24, it will be found, we think, to have little if any bearing upon the question. The object of that section was to abolish entails in both real estate and slaves, whether conveyed by deed or devise; and the proviso contained in the section has exclusive relation to a conveyance or devise of real estate, and cannot, therefore, have any influence upon the construction which must be placed upon a devise or conveyance of slaves."

A later case expressly declared that the common law rule was still in effect insofar as personal property was concerned and held the devise in question void under that rule.[13]

The first case which contained an informative interpretation of the proviso is the leading case of *Jordan v. Roach*.[14] The devise was to testator's daughter and her heirs forever, but should she die without issue, or if her child or children surviving her should die before arriving at the age of twenty-one, then the estate shall revert to testator's other children and their heirs. The other children of testator now claim under the limitation over—the devisee having died with issue who survived her only a few weeks. The Court held that the devisee took a fee simple determinable, and that the limitation over was an executory devise. The Court then proceeded to determine whether or not the executory devise was valid under the common law rule against perpetuities.

> "But in the will before us, the issue of Mrs. Jordan would not take by immediate devise, as purchasers, but by descent, as her heirs; and are not referred to as specified individuals, but as a class or denomination of persons to take in succession, any individual of whom, attaining the age of twenty-one, would be entitled . . . . Assuming then, that according to the true legal construction of the will the issue of the issue, or the grand-children of Mrs. Jordan, were included within the objects of the testator's generosity, the limitation over could not vest, so long as a grand-child or great-grand-child of the first devisee survived. Hence, if she should die leaving issue, and such issue should die under the age of twenty-one years, leaving issue, although the latter might die under that age, the contingency upon which alone the limitation could take effect would not happen within twenty-one years

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12Powell v. Brandon, 24 Miss. 343 (1852).
13Caldwell v. Willis, 57 Miss. 555 (1880).
1432 Miss. 481 (1856).

> from the death of the first taker. The contingency would, therefore, be too remote, and consequently the limitation over is void as an executory devise."

Having concluded that the devise was violative of the common law rule, the court turned to the proviso of the statute.

> ". . . the object and effect of the proviso, beyond question, are not to allow an estate tail to be limited directly to one, or where there are a succession of donees to the remainderman . . . . But the legislature thought, and thought wisely, that the right of alienation might, consistently with sound policy, be suspended for a limited period of time after a person, either by conveyance or devise, has divested himself of the ownership of his estate. It has accordingly fixed that limit to a life or lives in being, giving to the donor or devisor the right to limit the ultimate fee to the heirs of the body of the remainderman; and in default of such heirs, to his own right heirs. Within this limit, the partial interests or particular estates given to the successive donees, may, without doubt, be created by deed, or limited by executory devise. Whatever interest the donor or devisor may choose to give to the remainderman, where the estate is conveyed to a succession of donees, with a limitation over to the heirs of his body, it is certain that it cannot be an estate of inheritance, as the heirs of the body of the remainderman must take, if they take at all, as purchasers, and not as heirs . . . . Now, if we test the validity of the limitation in question by the provisions of the statute, it is seen clearly, that it is not only unauthorized but repugant to the obvious policy of the law."

Certainly, under its construction of the will, the Court properly held the limitation over invalid as violative of the common law rule against perpetuities, and also as repugant to the statute. Judge A. M. Clayton adversely criticizes the Court's construction of the will in an article in *George's Digest*[15] contending that the authorities do not sustain the view that "children" mean "grandchildren" or issue generally. But, be that as it may, the Court laid the foundation for interpretation of the statute. One can only wonder why the Court thought it necessary to test the devise by the common law rule, since it seems that the Court, as constituted in 1904, was of the opinion that the statute amended the common law.[16] A logical reason for the application of the common law rule might well be that the Court thought both rules existed and that the devise must meet the test of each.

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[15]George's Mississippi Digest, Limitation of Estates, p. 499 (1872).
[16]Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

Another landmark case construing the original statute was decided in 1881, long after the two donee provisions had been added.[17] The case concerned a deed conveying realty to trustees in trust for the use of A for life, at his death to all his children who attain the age of 21 or marry; and if A should die leaving no child who should attain majority or marry, then to B for life, at his death to his children who attain the age of twenty-one or marry; and if B should die leaving no child who should attain majority, then to all grandchildren of the grantor. The Court said that the limitation did not offend "the rule against perpetuities, nor against our statutes on that subject." The Court then stated that the common law rule only required that an interest should vest within twenty one years and ten months "after the death of the last survivor of any number of successive donees or devisees, who were in being at the time the conveyance took effect, and such also is the requirement of the statute in force when the deed was made." The Court appears to be saying that the original statute was merely a codification of the common law rule, at least as to the period within which the interest must vest. There has been much conjecture on this point. In a later case, the Court thought the twenty-one year period was not intended to have been read into the statute,[18] but that theory is certainly not supported by the *Cannon* case. Therefore, the only change the statute made in the common law, if the *Cannon* decision is followed, was to limit the class of persons who could take under the ulterior limitation to the heirs of the body of the remainderman, or the right heirs of the donor. The Court also stated the oft repeated proposition that the statute did not give a formula for conveyancing but laid down a limit beyond which a grantor or devisor may not go, and within which he can use unbounded discretion.[19]

In *Gully v. Neville*,[20] a will was held to be totally invalid under the original statute. In the *Jordan* case,[21] where the ulterior limitation was void, the valid portion of the will was allowed to stand. The distinction, however, seems to be proper since in the *Gully* case the intention of the testator would have been defeated had the will been allowed to stand in part. It appears that if the scheme of the testator is not thwarted by the invalid limitation, the valid portion will stand, but if the intention of the testator is destroyed by the avoided portion, the will is wholly invalid. These generalizations have been used and fol-

[17]Cannon v. Barry, 59 Miss. 289 (1881). The will in this case was executed before the statute was amended in 1857.

[18]See note 16 supra.

[19]Cannon v. Barry, 59 Miss. 289 (1881); Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

[20]55 So. 289 (Miss. 1912).

[21]It seems that every case decided after the Gully case has allowed the valid portion of the will to stand.

lowed throughout the history of the statute.[22]

Under the original statute the decisions seem to be easily harmonized, and it appears the Court understood the statute as well at its inception as it ever has. It seems reasonable to assume that if the statute had been left in its original form most of the difficulties would have been resolved finally one way or another. At least the conveyancer or draftsman would have known with some degree of certainty that his writing would withstand the test of the statute. The lawyer could have reasonably assured the testator that he was not creating a "perpetuity." Unfortunately, the difficulties were just beginning.

1857 - 1930

In 1857 the statute was amended to provide "that any person may make a conveyance, or a devise, of lands to a succession of donees then living, *not exceeding two;* and to the heirs of the body of the remainder man; and in default thereof, to the right heirs of the donor in fee-simple."[23] "The restriction of the number of lives which may be counted to two was an ill-considered innovation introduced by New York in 1830 . . . ,"[24] and was followed by a few other states. It is probable that this was the source from which the amendment came. Criticism of the amendment would serve no useful purpose since that has been adequately accomplished by various writers.[25] It is evident that the criticism was well taken since the two donee provision was struck from the statute in 1930.

The first decision[26] rendered under the two donee provision concerned the following devise: To A for life, then to B, but if B die without issue or during minority, then to C and the children of D. It was held that the devise did not violate the two donee provision since the limitation over was "dependent upon the expiration of less than three lives in being and upon the dying of the holder of the particular estate without issue living at her death." No mention was made of the contention of counsel in his brief that the property was given to two donees and then limited to persons who were not the heirs of the body

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[22]Dulaney, The Two Donee Statute, 1 Miss. L. J. 398 (1929). The writer seems to be of the opinion that the Gully case will no longer be followed.

[23]"Estates in fee-tail are prohibited; and every estate which shall be created an estate in fee-tail, shall be an estate in fee-simple; Provided, that any person may make a conveyance, or a devise, of lands to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainder man; and in default thereof, to the right heirs of the donor in fee-simple." Miss. Code Rev. ch. 36, art. 3 (1857); Miss. Code Rev. § 2286 (1871); Miss. Code Rev. § 1190 (1880); Miss. Code Ann. § 2436 (1892); Miss. Code Ann. § 2675 (1906); Miss. Code Ann. § 2269 (1917).

[24]Lee, The Rule Against Perpetuities in Mississippi, 10 Va. L. Rev. 533 (1924).

[25]Gray, The Rule Against Perpetuities, § 746 n. 1 (4th ed. 1942); Smith, Mississippi's Odd and Confused Statute, 2 Miss. L. J. 228 (1929); Dulaney, The Two Donee Statute, 1 Miss. L. J. 398 (1929).

[26]Busby v. Rhodes, 58 Miss. 237 (1880).

of B, or the right heirs of the donor. In *Bibby v. Broome*,[27] a case where the limitation over was to persons not the heirs of the body of the remainderman or the right heirs of the donor, the devise was held to be void, ". . . for they are neither heirs of the body of the remainderman, nor right heirs of the donor consequently the limitation over to them violates Section 2675, Code of 1906." Perhaps the reason no consideration was given this point in the *Busby* case is that it was not raised in the court below. Chief Justice Smith, in the *Bibby* case, announced that it would be presumed that the ulterior limitees were statutory heirs under the two donee statute unless proven otherwise by the party denying the relationship.

It was during the early part of this period that the struggle began as to the correct construction of wills devising land to testator's children equally, with cross-remainders or executory limitations over to the surviving children when one or more of the children died without issue. This was a time honored method for the testator to provide for his children and grandchildren. But its value as a family dispositive technique was greatly lessened by the two donee proviso, as we shall see. There seem to be three distinct lines of authority on this point: There are cases which hold the limitation over to the survivors as invalid under the statute.[28] The leading case of *Smith v. Muse*[29] is typical. Testator devised to his wife and children equally, and if any one of the said children die leaving no heirs of the body surviving him, or descendants of such heirs, then that portion shall revert and go to the survivors of his children, and his wife equally. The Court held that the first clause devised a fee which was made defeasible in the second clause upon the death of a child without issue. "The donees, it is true, were all in being; that is not the trouble. It is that there were more than two successive donees or classes of donees." The estate limited was capable of being held by each one of the children of the testator in succession; therefore, the limitation was void. In all cases reaching this result, the Court found that the initial gift to the children was a fee simple defeasible upon their death without issue. Therefore, no way could be found to avoid the statute since such a devise is obviously not a gift to the children as a class. However, where the gift is to the testator's children for life, with a limitation over to the surviving children in event of failure of issue, the Court has been ready to mitigate the harshness of the statute by finding the gift to the children to be one

[27]116 Miss. 70, 76 So. 835 (1917); Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932); Morgan v. Morgan, 219 Miss. 480, 69 So.2d 282 (1954).

[28]Hudson v. Gray, 58 Miss. 882 (1881); Nicholson v. Fields, 111 Miss. 638, 71 So. 900 (1916); Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Norfleet v. Norfleet, 151 Miss. 790, 119 So. 306 (1928); Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957).

[29]134 Miss. 827, 98 So. 436 (1924).

to them as a class,[30] thus avoiding the succession of donees exceeding two. The leading case for this proposition is *Redmond v. Redmond,*[31] where testator devised to his seven children for their lives, and upon the death of any child, then to the remaining children, and after the death of the last child to be equally divided among all of the grandchildren. The Court said:

> "He made one devise to all of his children—one gift to all—to extend as long as the life of the longest liver . . . . There is not a succession of donees in the devise to his seven children . . . . The estate in the property disposed of is a life estate. The term of this life estate is the length of the life of the longest liver . . . and then at the end, when all of his children shall have died, the property goes to his grandchildren, his right heirs, in fee simple."

The doctrine of "class gifts" as it was first used seems to be a valid exception to the rule of *Smith v. Muse,* but the Court came to look upon it as a convenient escape hatch in almost any situation. In almost every case which devised a life estate to the children of the testator, the Court held it to be a gift to a class.[32] Judge Griffith, in a later case,[33] attempted "an approximation" of the definition of a class.

> "When there is a gift or grant to a number of persons, although one or all of them may be named, if the naming of them was intended merely as a matter of identification, and these persons are united or connected by some common tie, and it is clear that the donor was looking to the body as a whole or as a group, rather than to the members constituting the body as individuals, and that he intended that the group might fluctuate in numbers, so that, to preserve the group, if one or more of that body died during the period in question, the survivors should take the gift between them, either in equal or in some other naturally related portions, the gift is to be construed as one given to them as a class."

The third avenue which has been used by the Court to sustain gifts of the type under discussion appears in *Bullard v. Bullard.*[34] There the testatrix devised to her children for their lives, and after their death to their children then living, but should any of testatrix's

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30Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913); Shannon v. Riley, 153 Miss. 815, 121 So. 808 (1929); Morgan v. Morgan, 219 Miss. 480, 69 So.2d 232 (1954).

31104 Miss. 512, 61 So. 552 (1913).

32See note 25 supra. But see Bullard v. Bullard, 132 Miss. 544, 97 So. 1 (1923), reaching the same result in a somewhat different manner.

33Shannon v. Riley, 153 Miss. 815, 121 So. 808 (1929).

34132 Miss. 544, 97 So. 1 (1923). Compare Armstrong v. Thomas, 112 Miss. 272, 72 So. 1006 (1916).

children die without issue, his share shall go to the surviving children. It was reasoned that, "It is perfectly manifest . . . that it was the intention of the testatrix that the child or children of each life tenant should take the remainder in fee after the life estate of the deceased parent . . . . *We think it was her intention that a remainder in fee in the share of any one of her children who should die without issue should vest in the surviving children of the testatrix . . . .*" [emphasis ours] This approach gives to each of the testatrix's children a life estate in an undivided interest in testatrix's estate with a contingent remainder in fee to the issue of the children in their parents' share followed by a contingent remainder in fee in the testatrix's surviving children. This then, in effect, gives each child a life estate followed by a remainder. The statute obviously would not apply since the two donee provision is not violated. Using this theory, the Court could sustain almost any devise or conveyance, and certainly the cases following *Smith v. Muse.*

The recent case of *Carter v. Sunray Mid-Continent Oil Co.*[35] appears to have settled these issues in a rather convincing manner. The pertinent part of the will executed in 1899 was to A, B, and C (children) in common, but if any child die without bodily heirs living at death, then to the survivors; but if bodily heirs survive, then to them by representation. The Court in an excellent opinion rejected the contention that the devise created a gift to the children for the life of the longest liver. In refusing to torture the language of the will and call the devise a class gift, the Court distinguished the *Shannon* case saying it was "an exception to the general rule as to what constitutes a class gift."[36] The Court followed *Smith v. Muse* and held that the devise was violative of the two donee statute. It is evident that the Court, as presently constituted, applies a strict rule in regard to class gifts and will not strain the words of a deed or will in order to bring the gift within the class gift shelter. The theory of *Smith v. Muse* has triumphed, at least by implication, over the somewhat dubious authority of *Bullard v. Bullard.*

In the *Bullard* case the Court announced the rule that it is the duty of the Court to so construe the will, if possible, as to make the instrument valid, and in other cases[37] cites Mr. Gray for the proposition that the statute is not a rule of construction, but a peremptory command of law, the object of which is not to determine intention but to defeat intention.[38] If these two rules are taken together, it appears that

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[35]94 So.2d 624 (Miss. 1957).

[36]Citing Byrd v. Wallis, 182 Miss. 499, 181 So. 727 (1938); Lee v. Foley, 224 Miss. 684, 80 So.2d 765 (1955).

[37]Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927); Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

[38]Gray, The Rule Aginst Perpetuities, § 423 (3rd ed. 1912).

the Court will construe a will in the manner most favorable to its validity, and will then apply the peremptory command of law remorselessly.[39] However, the rule of construction outlined in the *Bullard* case would probably not be followed today.[40] Furthermore, the Court has held that it will not consider the ulterior limitations of a will if no question as to their validity is presented by the facts of the case.[41]

> "It is not necessary to consider all of the provisions of the will and to say whether under any of the contingencies therein mentioned the second part of this statute is violated. These questions cannot be considered until these contingencies arise and a proper case is then presented to the court for decision."[42]

During the period from 1857 to 1930 it became firmly settled that the twenty-one year and ten month period in gross, found in the common law rule, is also present under the two donee statute. The Court in *Middlesex Banking Co. v. Field*,[43] refused to overrule the prior cases on this point.[44]

> "It may further be conceded that it would have been wiser if this court had originally construed this statute, as intended, as a substitute for all common law rules to which its provisions can apply, instead of as merely amendatory of the common law; but for us it must be enough that the long line of contrary decisions has become crystalized into a rule of property."

The Court went on to indicate that it was reasonable to suppose no such period was intended by the statute, "since it fixes by its own terms the time limit within which the ultimate fee must vest . . . . But whilst that might have been the better holding originally, the direct contrary has been held in *Cannon v. Barry* . . . ."

One of the most anomolous decisions rendered construing the

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[39]"Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied." Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927).

[40]The problem was discussed generally in Carter v. Sunray Mid-Continent Oil Co., supra note 10, where the Court did not think such a liberal construction proper.

[41]Stigler v. Shurlds, 131 Miss. 648, 95 So. 635 (1923).

[42]In Carter v. Sunray Mid-Continent Oil Co., supra note 10, the Court felt the rule just announced of little merit, "although it is to be conceded that some of the language used in that case . . . as to contingencies provided for and which did not happen, has given us a good deal of concern on the question of whether or not the will now under consideration should be adjudged as of the date when it became effective, and looking forward to the contingencies that could have arisen instead of backward to determine whether or not it violates the two-donee statute in the light of what has actually happened."

[43]84 Miss. 646, 37 So. 139 (1904).

[44]Jordan v. Roach, 32 Miss. 481 (1856); Cannon v. Barry, 59 Miss. 289 (1881). See the later case of Lazard v. Hiller, 145 Miss. 449, 110 So. 855 (1927).

statute was that of *Thomas v. Thomas*.[45] The Court refused to decide whether realty or personalty was devised, but held that it made no difference since the devise violated neither the common law rule nor the statute. It was then stated that the statute had no application since the limitation involved an executory devise. The contention that the statute does not apply to executory devises was flatly rejected by Chief Justice Smith, on suggestion of error in *Bibby v. Broome*.[46] Judge Smith stated that the Thomas case was in conflict with the many prior cases[47] applying the statute to executory devises, and that the limitation in the *Thomas* case was a contingent remainder, not an executory devise.

The statute does not indicate what the effect of a void gift does to the valid portion of the instrument. Generally, the Court has construed the statute as intending the same result as in the case of a fee tail, and has usually held that the donee prior to the void limitation takes a fee simple,[48] thereby enlarging the estate devised by the instrument.

It is apparent from a review of the cases that the Court was not certain in regard to the question of whether the two donee statute was a substitute for, or merely an amendment to, the common law rule against perpetuities. The cases under the original statute, discussed in the preceding section of this article, give one the impression that the Court thought the statute was a codification of the common law;[49] but when the two donee provision was inserted it was evident that such a proposition could no longer be sustained. Many decisions indicate that the Court thought the statute now amendatory of the common law—by limiting the number of lives in being to two.[50] During this period the Court called the statute the "rule against perpetuities,"[51] "our statute against perpetuities"[52] and "the statute of this State against perpetuities."[53] Some cases have briefly discussed the issue. In *Bibby v. Broome*[54] the Court said: "Whether this clause of that section was in-

[45]97 Miss. 697, 53 So. 630 (1910).

[46]116 Miss. 70, 76 So. 835 (1917).

[47]Jordan v. Roach, 32 Miss. 481 (1856); Hudson v. Gray, 58 Miss. 882 (1881); Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912).

[48]In Davenport v. Collins, 95 Miss. 358, 48 So. 733 (1909), a life estate was enlarged into a fee simple. Many cases enlarged a fee simple determinable into a fee simple absolute. Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Carter v. Sunray Mid-Continent Oil Co., 94 So.2d 624 (Miss. 1957). However, the limitation of this rule found in Gully v. Neville, supra at note 15, must be noted.

[49]Cannon v. Barry, 59 Miss. 289 (1881).

[50]Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922); Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937).

[51]Beeks v. Rye, 77 Miss. 358, 27 So. 635 (1899); Nicholson v. Fields, 111 Miss. 638, 71 So. 900 (1916).

[52]Phillips v. Tynes, 114 Miss. 775, 75 So. 775 (1917).

[53]Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913).

[54]116 Miss. 70, 76 So. 835 (1917).

tended as a substitute for, or as only an amendment to, the common law rules with which it deals is not here material, for in either case, it must, of course, control wherever its provisions are applicable."[55] Other cases have taken a seemingly different view and leave the impression that both the statutory rule and the common law rule are presently in force.[56] In *Shannon v. Riley*,[57] the Court said: "The instrument is attacked from numerous points of assault as being, not in contravention of our common law rule against perpetuities, but in violation of our two-donee statute . . . ." On the other hand, in *Nichols v. Day*,[58] the Court discussed only the common law rule—since the two donee statute obviously had no application to the timber deed with right of perpetual renewal in question. Following the same vein of thought in the latest case construing the two donee statute, the Court refused to confuse the two rules stating: "There is enough apparent confusion in our own cases, without confusing the provisions of the two donee statute with the common law rule against perpetuities . . . ."[59] In that case the devise in question was clearly within the contemplation of the statute and no question of the common law rule had been presented in the lower court or on appeal. If any rule was stated in this decision it seems to be that when a case concerns a succession of donees and no question is raised as to the common law rule against perpetuities, then there is no need to consider the common law and only the statute will be applied. It is also implicit in this reasoning that where a case concerning the common law is presented, the Court will apply the common law rule as in the *Nichols* case.

Evidently, the attitude of the Court changed during the later years of this period to the realization that all perpetuity problems could not be resolved by the two donee statute, and that in appropriate cases the common law rule still exists.

1930 - PRESENT

In 1930 the statute was amended to read as does the present section 838.[60] The two donee provision was omitted and a conveyance or devise of lands may be made to succession of donees then living, and up-

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55See also Middlesex Banking Co. v. Field, 84 Miss. 646, 37 So. 139 (1904).

56Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927), ". . . would not violate the rule against perpetuities or the two donee statute." Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

57153 Miss. 815, 121 So. 808 (1929).

58128 Miss. 756, 91 So. 451 (1922).

59Carter v. Sunray Mid-Continent Oil Co., supra note 10.

60"Estates in fee tail are prohibited, and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir." Miss. Code Ann. § 838 (1942).

on the death of the last donee, to any person or any heir. Apparently, the present statute is similar to the original statute except for the restriction in the old statute that the limitation over must be to the heirs of the body of the remainderman or the right heirs of the donor. No decision has as yet expressly construed the present statute. Hence, any discussion of its meaning and effect is mostly conjecture. However, there is some basis for discussion to be found in the cases construing the original statute and in the opinions of various writers.

The works of the leading text-writers offer little of value on this point. Gray only ventures that "It appears that the common law rule against perpetuities has always remained in force in Mississippi, as modified by statute."[61] Other writers are of the opinion that the statute modifies the common law rule in some manner, but decline to be specific.[62] A more informative opinion was given in an article appearing shortly after the statute was amended in 1930[63] which stated that "the only change made by the new statute of the common law rule is the elimination from that rule of the twenty-one year period after the death of some person living when the conveyance or devise is made." This is perhaps the most reasonable view from a literal reading of the statute. But, the argument overlooks the prior decisions of the Court which hold that the twenty-one year period was implicit in the statute.[64] Further, it must be remembered that for the purposes of determining whether the period in gross is to be construed as present, no material change has been made in the statute. One cannot deny that such a judicial interpretation may appear to strain the plain words of the statute. However, the revisor is presumed to know the content of the prior decisions of the Court on this point and evidently did not see fit expressly to exclude the period in gross from the present statute. Therefore, if prior judicial construction and precedent are to control, the present statute is a substantial re-enactment of the common law rule against perpetuities. But even if this be true, does it dispose of all perpetuity problems? The answer must be that it does not, for several recent cases have applied the common law rule to the exclusion of the statute.[65] In a 1941 case[66] concerning an oil and gas lease with a perpetual renewal clause, the Court stated that the lease did not violate the common law rule because the interest was a present vested interest,

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[61]Gray, The Rule Against Perpetuities, § 746 n. 1 (4th ed. 1942).

[62]Simes & Smith, The Law of Future Interests, § 1437 (2nd ed. 1956); 6 Am. Law of Real Property § 25.89 (1952); Rubenstein, Perpetuities, ch. III, p. 34 (1959).

[63]Holmes, Some Observations on the Statutory Rule Against Perpetuities, 4 Miss. L. J. 122 (1931).

[64]See note 44 supra.

[65]Greenwood I.O.O.F. v. Hyman, 180 Miss. 198, 117 So. 43 (1937); Jones v. Burns, 231 Miss. 833, 74 So.2d 866 (1954).

[66]Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941).

and that the present section 838 was not applicable to such a case since it did not concern a succession of donees. However, a leading case in Mississippi for the proposition that the common law rule is in force is *McCormack v. Blanks*,[67] which was decided without reference to the statute. The testator devised his real and personal property to his wife so long as she remained his widow, and thirty years after the death of the testator the title of all the property was to vest in such of his children or their descendants as did not convey or attempt to convey their interest in the estate. The Court held that the devise was violative of the common law rule against perpetuities and against alienation, quoting the general rule from *American Jurisprudence* that no interest subject to a condition precedent is good unless such condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.[68] Obviously, the devise violates the common law rule since no lives in being were suggested and the interest would not vest until a period greater than the allowable twenty-one years.[69] Although the statute was not relied upon in determining the validity of the devise, cases construing the statute were cited as precedent to determine the effect of the void limitation upon the remaining portion of the will.[70] Under the decisions since 1930 it can safely be said that both the statutory rule and the common law rule against perpetuities are present, and it can no longer be considered that the present statute is a complete substitute for the common law in regard to perpetuities.

CONCLUSION

While it is difficult, if not impossible to state any definite or hard and fast rules which will apply to every case arising under the two-donee statute or the statute as amended in 1930, in recent cases the Court has indicated its views on the subject. The present Court, when applying the statute, will not search for a "class gift" or other method to avoid the effect of the statute which will torture the plain words of the instrument. This is not to say that a will construed under the two donee provision which devises a proper class gift under the doctrine of the *Redmond*[71] case will be invalidated, but that the devise or conveyance will be given its natural meaning and will be construed in accordance with the rule that the statute is not a rule of construction but a peremptory command of law. Further, it seems the statute will be ap-

[67]226 Miss. 767, 85 So.2d 204 (1956); Note, 28 Miss. L. J. 88 (1956).
[68]41 Am. Jur., Perpetuities and Restraints on Alienation § 3 (1939).
[69]Simes, Future Interests, § 1225 (2nd ed. 1956).
[70]Thomas v. Thomas, 97 Miss. 697, 53 So. 630 (1910); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).
[71]See note 31 supra.

plied to all cases where there is a succession of donees, to the exclusion of the common law. Conversely, where the instrument devises or conveys in any manner other than to a succession of donees, it appears the common law rule against perpetuities is in force and will be applied as in the *McCormack*[72] case. If this is a valid conclusion based upon the decision, a devise or conveyance of lands must stand the test of both the statutory rule and the common law rule against perpetuities in appropriate situations. Thus A devises land to B twenty-five years after the death of A. It would appear that in such an event the statutory rule would be inapplicable, and the common law rule would apply. On the other hand where A devises land to B, C, and D for their lives and then ten years after the death of the longest liver to E, then the statutory rule would be applicable. In this latter situation if the present statute is literally construed, then the gift to E would be void since it does not take effect until ten years after the death of the longest liver or "succession of donees." However if the Court should conclude that the present statute includes the period in gross by implication and precedent, then the gift to E would be good since it would vest at a time well within twenty-one years after the death of the longest liver.

It appears that Mississippi has a statutory rule against perpetuities which is embodied in Section 838 of the Code. This rule is applicable where there has been a conveyance or devise of land to a succession of donees then living, and upon the death of the last of said successors to any person or any heir. It should be applied only in appropriate situations. But it must be remembered that the Mississippi Supreme Court has not, as yet, construed the statute as presently written, but the Court has available to it substantial precedent arising under the original enactment in 1822.

It seems to be equally true that there is also in force in Mississippi the common law rule against perpetuities. The common law rule is applicable in those situations which are not within the present statute. The common law rule should be applied only in appropriate situations not covered by the statute.

It appears that the two donee statute will control all cases arising within its frame of reference when the Court must construe instruments drawn while the statute was in force. The result in cases arising under the two donee statute may be predicted only insofar as the factual picture is analogous to the general decisions discussed earlier in the article.

As a matter of judicial policy the Court should not be required or prevailed upon to engage in judicial legislation by reading the com-

[72]See note 67 supra.

mon law rule against perpetuities into the present statute. Indeed to do so would more than "torture" the words of the statute.

As a matter of legislative policy and consistent with the present expressed State objective of attracting capital and industry to Mississippi as well as permitting its citizens to enjoy greater control over their real property, the Legislature should amend Section 838 by deleting that portion in controversy. This in effect would leave the common law rule against perpetuities alone in force in Mississippi.

INTERSTATE CRIMINAL EXTRADITIONS

*G. Garland Lyell, Jr.**

The need for a procedure for extradition between the states of persons charged with crime was recognized in the Constitution of the United States even when the ramifications and complexities of criminal organizations as they exist today were unknown. The Constitution, Section 2 of Article IV, provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on the demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime." The quoted provision is not self-executing and, in fact, left much to be worked out by legislation. This was accomplished partly by federal statutes[1] and in part by state statutes.[2] The Federal Constitution and statutes are controlling, thus state statutes are uniformly held to be valid so long as they are in aid of and not in conflict with the former. In state legislation there has been considerable lack of uniformity throughout the years, and, hence, great opportunity for confusion in administration. Much of this confusion has been eliminated in recent years by the adoption, in whole, or in substantial part, of the *Uniform Criminal Extradition Act*[3] which over forty of the fifty states of the union have adopted. Mississippi has not seen fit to adopt this act, though the adoption has been considered in the past by our state legislature. However, since the great majority of the states operate under the uniform act, we in Mississippi, who are confronted with the extradition of fugitives in other states, must, of necessity, become familiar with its provisions.

While there is no great mystery or difficulty in resolving the many questions that arise in extradition matters, most prosecuting attorneys throughout the state, particularly those new in office, have had little, if any, experience in the preparation of the necessary documents to institute such a procedure. Hence, rather than present a legal dissertation on the many questions involved, this article is intended more as a practical guide to the County Attorneys and District Attorneys and to those in private practice who find themselves representing an alleged fugitive from justice. The several states have various requirements which must be met, and it is believed that if the procedures outlined herein are followed, applications originating in Mississippi will be readily accepted by the authorities of the other states.

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[1] 18 U.S.C.A. § 3181 et seq. (1948).

[2] Miss. Code Ann. §§ 3981-3984 (1942).

[3] See Appendix "D".

THE ESSENTIAL INSTRUMENTS

A. After Indictment

In those cases where the alleged fugitive has already been indicted, the prosecuting attorney should prepare an *Application For Requisition* addressed to the Governor of Mississippi requesting that he, in turn, make requisition upon the governor of the asylum state. The office of the Attorney General maintains a supply of printed forms which may be obtained at any time. A sample with blanks filled in is attached as Appendix "A" hereto.[4] This application is executed by the prosecuting attorney (not by a sheriff or other officer) *in triplicate,* and to each executed copy should be attached a copy of the Indictment and the Capias issued thereon—both of which are certified by the clerk of the court with his usual form of certificate to the effect that they are true and correct copies of the originals on file in his office. After certification by the clerk, they should be further authenticated by execution, by the circuit judge and the clerk, of the *Judge's And Clerk's Certificate* shown as "Appendix B"[5]—a supply of which is also maintained in the office of the Attorney General.

These instruments are the only ones absolutely necessary for preparation by the prosecuting attorney, but, under the practice of some states, it is desirable for the prosecuting attorney to give a statement of facts upon which the charge is based and also to attach copies of the statute or statutes under which the indictment was brought.

B. On Affidavit Before A Justice of the Peace

It is not necessary to first procure an indictment. If extradition is sought after affidavit has been made against the alleged fugitive before a Justice of the Peace, it is sufficient to attach to each copy of the Application For Requisition, in triplicate, copies of the affidavit and warrant issued thereon certified by the Justice of the Peace. In this case there should be a certificate from the circuit clerk to the effect that such Justice of the Peace is the duly elected, qualified and acting Justice of the Peace in the particular district and county, and that, as such, he is a committing magistrate. This should be followed by the Judge's And Clerk's Certificate executed by the circuit clerk and the circuit judge.

Insofar as the instruments themselves are concerned, when the county or district attorney has submitted the above instruments with his Application For Requisition to the governor, he is finished with the mechanical aspects of the extradition. They are then approved by the Attorney General as to form and content and transmitted to the

[4]See Appendix A.
[5]See Appendix B.

Governor with an approving letter. When received by the governor, he makes the formal demand upon the governor of the asylum state and also prepares an instrument designating the person named in the application as the agent for the State of Mississippi to go to the asylum state, take custody of, and return the fugitive when the extradition has been granted.

NON-SUPPORT CASES

A large percentage of the extradition matters, both outgoing and incoming, are cases in which fathers are charged with abandonment or desertion of minor children and with leaving them in destitute and necessitous circumstances. Practically every state has a statute similar to Section 2087 of Miss. Code Ann. (1942), which makes this a crime. Under Section 5 of the *Uniform Enforcement of Support of Dependents Act*,[6] extradition may be had for any person charged with the crime of failing to provide for the support of dependents in this state. This uniform act has been adopted by all of the states and territories of the United States. However, though there is no question that a person charged with child desertion can be extradited under these statutes, the governors of many of the states have adopted rules with respect thereto. Governor J. P. Coleman, incumbent Governor of Mississippi, has followed the principles of these rules which are generally in substance as follows:

Before the Governor will honor an extradition request in a non-support case, the application for requisition must be accompanied by a sworn statement from the prosecuting attorney as to one or more of the following:

(1) The civil remedy under the Uniform Enforcement of Support of Dependents Act has been first attempted, or

(2) The accused may be afforded an option to submit to the jurisdiction of a Chancery Court in Mississippi for entry of an appropriate order of support under said act, or

(3) That the accused has hitherto flagrantly violated an enforceable order of support entered in Chancery Court in Mississippi.

The reason for the adoption of the above rules and similar rules by other governors is obvious. Frequently in such cases the criminal processes are being resorted to with no idea of prosecution, but are used merely to return the defaulting person to another jurisdiction for the purpose of collecting money; and in most cases where the defaulter is willing to submit to an order under the uniform act in the asylum state, it would serve absolutely no purpose to return him to the demanding state. Furthermore, the purpose of the Uniform Sup-

[6]Miss. Code Ann. §§ 456-1 through 456-34 (1942).

port Act would be defeated in many cases where the defaulter is gainfully employed in the asylum state and would have no income should he be extradited. Therefore, if extraditions are sought in this type of case, it should be made plain that the extradition is sought for criminal prosecution after a fruitless resort to the civil processes.

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN OR WITHOUT A STATE IN CRIMINAL PROCEEDINGS

Practically all of the states and territories have adopted acts similar to that found in Sections 1892 through 1897 of Miss. Code Ann. (1942), enacted as Chapter 261 of the Laws of Mississippi of 1938. This act sets out a procedure not often resorted to but of great value in procuring the attendance of witnesses in criminal prosecutions where the witness is beyond the jurisdiction of the State of Mississippi. The procedure is a relatively simple one as set out in the statute, and on March 2, 1959 the constitutionality thereof was established by the United States Supreme Court in a case that was appealed from the Supreme Court of Florida.[7]

EXPENSES

Some states make a charge for processing extradition papers, some make no charge, and some operate on a reciprocal basis. Frequently the states making the charge will hold up action pending receipt of this fee. Appendix "C"[8] is a compilation recently made by the Secretary of State of New Mexico showing what fees are charged by the several states. To facilitate prompt handling, it is suggested that a check accompany the Application For Requisition if Appendix "C" indicates the asylum state charges such a fee.

The question frequently arises as to the authority of a county to pay the expenses of the agent and other persons who must necessarily travel to an asylum state to return a fugitive being extradited. This is of particular concern when extradition is resisted in the asylum state and a hearing is held by the governor of that state. While normally the attorney general will represent the demanding state as a matter of comity, at times the prosecuting attorney is called upon to appear either alone or with witnesses in aid of extradition. Witnesses are seldom necessary except where the alleged fugitive denies his presence in the demanding state at the time of the crime with which he is charged. Sections 3964 and 3965 of our Code provide for payment of expenses of those persons who must necessarily travel in connection with the return of such fugitives.

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[7]People v. O'Neill, 79 U.S. 19 (1958).
[8]See Appendix C.

In this connection, before incurring travel expenses it is well to keep in mind that, under the practice prevailing in practically all of the states, the agent of the demanding state should not go after the fugitive until he has been notified by the authorities of the asylum state when and where the fugitive may be taken into custody by the agent. Unless directed to do so by the authorities of the asylum state, it is not a good policy to travel thereto with papers in hand. Frequently an agent does this only to find that a hearing has been asked for, or that there is some procedural requirement which has not been met, and he returns empty-handed. In practice, the governor of the demanding state requests the authorities of the asylum state to notify the agent of the demanding state when and where the fugitive may be taken into custody for return.

In this respect, while the governor and the attorney general have their duties in connection with these matters, neither has a fund from which such expenses can be paid, and it is the duty of the prosecuting attorney to follow up the matters involved after the governor has made his demand upon the asylum state.

ARREST BEFORE EXTRADITION

Except in rare cases, the governors of the states will not honor an an extradition unless the person sought is in custody. To do otherwise would give the agent of the demanding state a warrant to rove the asylum state in search of the fugitive, and most governors are reluctant to do this. The general rule in all states is that asserted in *Loper v. Dees*[9] to the effect that a person charged with a felony or other crime in one state, who has fled to another state, may, before demand for his extradition is made, be arrested in the state in which he is found and detained in custody a reasonable time—in order to give the executive of the state from which he has fled opportunity to issue a Requisition For Extradition. A telegram, letter or telephone call is usually sufficient authority for the arrest of the fugitive in the asylum state. As to what constitutes a reasonable time during which a fugitive may be held, the uniform act sets out a thirty day period, after which the fugitive will be released unless an extension of time is granted by the court of the asylum state. In any event, whether the particular state has adopted the uniform act or not, it is wise to prepare and forward the papers immediately upon the location and arrest of the fugitive.

DEFENSES IN EXTRADITION

There are two methods by which sufficiency of the proceedings may be tested in the asylum state. A fugitive may request and obtain a hear-

[9]210 Miss. 402, 49 So.2d 718 (1951).

ing before the governor of that state, or, either with or without having had such a hearing, a habeas corpus proceeding is available to him. Hearings held by a governor are usually informal—but with a general adherence to the rules of the evidence. Neither the governor nor a court on habeas corpus should question the authenticity of extradition papers since the authentication by the governor of the demanding state is conclusive.[10] The purpose of authentication of the affidavit or indictment charging a crime is to prevent the governor of the state upon whom the demand is made from being confronted with spurious charges of crime, and to advise him of the genuineness of the copy of the indictment or affidavit. The governor of the asylum state must be satisfied, either from an inquiry conducted by him at his option, or on the basis of the prima facie presumption carried by the regularity from justice of the demanding state; that is to say that he was in the demanding State at the time of the commission of the alleged crime and has departed therefrom into the state where he was found.[11] It has been a common practice in this State in crimes where the date thereof is not of essence, to show in the indictment that the alleged crime was committed on the date of the indictment, or "on or before." This practice leads to some difficulty where it is later sought to extradite the accused, since the crime may have been committed several months prior to the date in the indictment, and he sometimes is able to show the authorities of the asylum state that he was not in the demanding state on, or anytime near, the date in the indictment—thereby evading extradition. It is, therefore, suggested that the date in the indictment be accurate, whether of essence or not, if there is any likelihood that extradition must be employed.

With respect to the presence of the accused in the demanding state at the time of the commission of the crime, attention is directed to Section 6 of the *Uniform Criminal Extradition Act*. It will be noted that under the uniform act there are certain extraditable offenses which do not necessitate physical presence of the accused in the demanding state. However, in all cases where physical presence is necessary and where the accused was actually physically present in the demanding state, there should be an express sworn statement to that effect by the prosecuting attorney or the prosecuting witness. Mississippi has not adopted a law similar to section 6 of the uniform act but this does not prevent extradition from states which have this provision in their law. It has been held that it is only necessary that the asylum state make such provision in its law.[12]

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[10]Ex parte Riccardi, 68 Ariz. 180, 203 P.2d 627 (1949). See also 18 U.S.C.A. § 3182, n. 77 (1948).

[11]Bishop v. Jones, 207 Miss. 423, 42 So.2d 421 (1949).

[12]Ex parte Morgan, 86 Cal. App. 2d 217, 194 P.2d 800 (1948), *affirmed* 78 F. Supp. 756 (S.D. Cal. 1948), *affirmed* 175 F.2d 404 (9th Cir. 1949), *cert. denied* 338 U.S. 827; Thomas v. O'Brien, 95 A.2d 120 (N.H. 1953).

In reference to action or inaction by the governor of an asylum state, it is well to note that he cannot be compelled by any agency or tribunal to issue a warrant of extradition even though the act may make it his duty to do so under particular circumstances.[13] However, in the interest of the orderly administration of justice and comity between states, most governors will promptly extradite, if: (1) the demand has been made in proper form; (2) identity has been established; (3) the person sought is a fugitive from justice or, in states which have adopted the uniform act, he has committed an act which intentionally resulted in a crime in the demanding state; and, (4) he has been charged with a substantial crime. These are the considerations to which a governor should limit himself. Likewise, a court on habeas corpus should be so limited.

CONCLUSION

Because of the fact that the uniform act is more complete than our own laws on the subject and has been adopted by practically every jurisdiction with which we must deal, if the act is complied with there will be no difficulty in the preparation and handling of extraditions. A recommended addition to the library of those interested in these matters is the *Handbook on Interstate Crime Control,* published by the Council of State Governments, 1313 East Sixtieth Street, Chicago 37, Illinois, which contains the several uniform acts, together with annotated discussion of the practices thereunder.

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[13] 2 Miss. L. J. 240.

APPENDIX A

APPLICATION FOR REQUISITION

TO HIS EXCELLENCY,

Peter Poe, Governor of the State of Mississippi:

Your petitioner, John Johnson, (District Attorney), for the County of Suffolk, State of Mississippi, would represent unto your Excellency that Joe Doe stands charged by the accompanying certified copy of Indictment with the crime of Mayhem committed in the County of Suffolk, State of Mississippi, on or about the 13th day of March, 19_____.

That on or about the 14th day of March, 19_____, after the commission of said crime, the said John Doe fled from the State of Mississippi, and is now, as your petitioner verily believes, in the County of Woonhagen, State of Arizona, a fugitive from justice of this state, and the grounds of such belief are as follows:

> Telegram from Sheriff of Woonhagen advising subject in his custody.

Wherefore, your petitioner prays that a requisition may issue upon the Governor of the said State of Arizona, and that Richard Roe of the City of Billings, County of Kings, State of Mississippi, may be appointed messenger of the State of Mississippi to go after, receive, and return the said fugitive to the County of Suffolk, State of Mississippi, for trial.

Your petitioner further certifies that a requisition of the above-named fugitive is not sought for the purpose of collecting a debt, to allow any person to travel at the expense of the State, or to answer any private end whatever, and shall not be used for any of said objects, and further certifies that in his opinion the ends of public justice require that the said John Doe be brought to this state for trial at public expense, and that he believes there is sufficient evidence to secure his or her conviction.

/s/ John Johnson
District Attorney (Title)

Subscribed and sworn to before me, this 13th day of April, 19_____
(SEAL)

/s/ Laverna Smith
Circuit Clerk

(This petition and all other papers presented in connection with an application for requisition must be in triplicate. The petition must, in all cases, be accompanied by a certified copy of the indictment found against the fugitive, or, in the absence of an indictment, a certified copy of an affidavit made before and on file in the office of a Magistrate charging the fugitive with a crime. Certified copies of the capias, or warrant, for the arrest of the fugitive should also accompany the papers.)

APPENDIX B

JUDGE'S AND CLERK'S CERTIFICATE.

STATE OF MISSISSIPPI
COUNTY OF SUFFOLK

I, J. Jones, Judge of the Circuit Court of Suffolk County, said State, do hereby certify that Laverna Smith, whose name is subscribed to the above and foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the Clerk of the Circuit Court of Suffolk County, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be, attached to all his official acts, as such, in all courts of record and elsewhere, and further that his said attestation is in due form of law, and by the proper officer.

Given under my hand, this 13th day of April, 19.....

/s/ J. Jones
Judge of Circuit Court of Suffolk County, Mississippi, Thirty-Second Judicial District Thereof.

STATE OF MISSISSIPPI
COUNTY OF SUFFOLK

I, Laverna Smith, Clerk of the Circuit Court of Suffolk County, do hereby certify that J. Jones, whose name is subscribed to the foregoing certificate of attestation now is, and was, at the time of signing the same, Judge of said Circuit Court, and was duly elected, commissioned, and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such, in all courts of record and elsewhere, and that his attestation is in due form of law, and by the proper officer.

Given under my hand the seal of said court, at Jackson in said county, this 13th day of April, A.D. 19.....

/s/ Laverna Smith
Circuit Clerk, Suffolk County

(SEAL)

APPENDIX C

	Copies of Request	Charge for Processing		Copies of Request	Charge for Processing
Alabama	1	None	Nebraska	2	Reciprocal
Arizona	3	$5	Nevada	1	None
Arkansas	2	None	New Hampshire	2	None
California	1	None	New Jersey	2	None
Colorado	2	$5	New Mexico	2	$3
Connecticut	1	None	New York	1	None
Delaware	2	None	North Carolina	3	Reciprocal
Florida	1	$5 (To Governor)	North Dakota	3	$5
Georgia	2	*Reciprocal	Ohio	2	None
Idaho	2	None	Oklahoma	2	$2.50
Illinois	2	None	Oregon	1	None
Indiana	3	$3	Pennsylvania	2	$3
Iowa	2	$5	Rhode Island	2	None
Kansas	1	$5	South Carolina	1	None
Kentucky	1	$5	South Dakota	2	$3
Louisiana	3	$2	Tennessee	3	None
Maine	1	None	Texas	2	$1
Maryland	1	$2	Utah	1	$5
Massachusetts	1	None	Vermont	1	None
Michigan	1	Reciprocal	Virginia	1	$4**
Minnesota	2	None	Washington	1	None
Mississippi	2	None	West Virginia	1	$2
Missouri	1	$2.50	Wisconsin	1	None
Montana	1	$5	Wyoming	1	$5

*(Same charge, if any, as that made by requesting State.)

** (To State Treasurer)

APPENDIX D

THE UNIFORM CRIMINAL EXTRADITION ACT

AN ACT TO MAKE UNIFORM THE PROCEDURE ON INTERSTATE EXTRADITION

Be it enacted, etc.:

SEC. 1. *Definitions.* Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

SEC. 2. *Fugitives from justice; duty of governor.* Subject to the provisions of this act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.

SEC. 3. *Form of demand.* No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

SEC. 4. *Governor may investigate case.* When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

SEC. 5. *Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.* When it is desired to have returned to this state a person charged with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of

this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 23 of this act with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

SEC. 6. *Extradition of persons not present in demanding state at time of commission of crime.* The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

SEC. 7. *Issue of governor's warrant of arrest; its recitals.* If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

SEC. 8. *Manner and place of execution.* Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

SEC. 9. *Authority of arresting officer.* Every such officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

SEC. 10. *Rights of accused person; application for writ of habeas corpus.* No person arrested upon such warrant shall be delivered over to agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof,

and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

SEC. 11. *Penalty for noncompliance with preceding section.* Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined [not more than $1,000.00 or be imprisoned not more than six months, or both].

SEC. 12. *Confinement in jail when necessary.* The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of the county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; *Provided however,* That such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

SEC. 13. *Arrest prior to requisition.* Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under section 6, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other states and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 6, has fled from justice, or with having been convicted of a crime in the state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in

this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

SEC. 14. *Arrest without a warrant.* The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

SEC. 15. *Commitment to await requisition; bail.* If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under section 6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

SEC. 16. *Bail; in what cases; conditions of bond.* Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state.

SEC. 17. *Extension of time of commitment; adjournment.* If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section 16, but within a period not to exceed sixty days after the date of such new bond.

SEC. 18. *Forfeiture of bail.* If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within the state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

SEC. 19. *Persons under criminal prosecution in the state at time of requisition.* If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the gover-

nor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

SEC. 20. *Guilt or innocence of accused; when inquired into.* The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

SEC. 21. *Governor may recall warrant or issue alias.* The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

SEC. 22 *Fugitives from this state; duty of governors.* Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

SEC. 23. *Application for issuance of requisition; by whom made; contents.*

I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the

complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state, to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

SEC. 24. *Costs and expenses.* [When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and not exceeding—cents a mile for all necessary travel in returning such prisoner.]

NOTE.—The provisions in this regard will so vary with the different states that the same must be drafted separately in each state.

SEC. 25. *Immunity from service of process in certain civil actions.* A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

SEC. 26. *Written waiver of extradition proceedings.* Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 7 and 8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; *Provided, however,* That before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in section 10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; *Provided, however,* That nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding

state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

SEC. 27. *Non-waiver by this state.* Nothing in this act contained shall be deemed to constitute a waiver by the state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdictions in any way whatsoever.

SEC. 28. *No right of asylum; no immunity from other criminal prosecutions while in this state.* After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requision for his extradition.

SEC. 29. *Interpretation.* The provisions of this act shall be so interpreted and construed as to effectuate the general purposes to make uniform the law of those states which enact it.

SEC. 30. *Constitutionality.* If any provisions of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

SEC. 31. *Repeal.* All acts and parts of acts inconsistent with the provisions of this act and not expressly repealed herein are hereby repealed.

SEC. 32. *Short title.* This act may cited as the Uniform Criminal Extradition Act.

SEC. 33. *Time of taking effect.* This act shall take effect on the ---------- day of ---------- 19------

PRIORITY BETWEEN DEED OF TRUST AND SUBSEQUENT MECHANIC'S LIEN

*Lester F. Sumners**

There is, probably, no problem in law more perplexing than the priority of liens between innocent parties. Perhaps no more embarrassing trap exists for a young lawyer than a reliance upon a deed of trust being an unqualified first lien—questions of title aside. At the risk of recounting explorations along a trail already well known to Mississippi lawyers, this article will deal with the development of the mechanic's lien statute and its priorities over prior deeds of trust.

For a point of beginning, let us assume a typical set of facts. Builder wishes to develop vacant property as a subdivision and obtains a loan from bank for construction funds to be advanced as needed, with the loan secured by a deed of trust. Builder trades with contractor for a building on one of his subdivided lots. Bank advances funds to builder who fails to pay contractor. The result is that for 12 months contractor has a prior lien over the bank's deed of trust. Or, to change the facts slightly, assume that the bank was cautious and made advances directly to contractor until he was paid in full. The bank would have a first deed of trust lien for so much of its funds as were used in the construction but any remaining portion of the secured loan might be defeated by "extra" labor or materials ordered by builder.

How does it happen that a mortgagee, in order to enjoy security for the full amount of his loan, must be able to trace 100 per cent of the money into the purchase of land or actual cost of construction?

Mortgages existed at common law and were always recognized as security in courts of equity.[1] Artisans had a possessory lien at common law for work done on personal property.[2] Mechanic's liens, however, ". . . were neither recognized at common law nor allowed in equity."[3] The mechanic's lien, therefore, exists solely by statute and such statutes in Mississippi, though in derogation of common law, have been liberally construed to effectuate their remedial purpose.

The earliest opinion construing the mechanic's lien statute aligned Mississippi with those jurisdictions giving liberal construction in favor of the lien. "The claims of the mechanic are favored in law. They are

*Smallwood, Darden & Sumners, New Albany, Mississippi.

1 36 Am. Jur., Mortgages § 2.

2 33 Am. Jur., Liens § 16.

3 36 Am. Jur., Mechanic's Liens § 3.

often unlettered men . . ." and the courts will give their statutes a free interpretation in their favor.[4]

The first decision construing the mechanic's lien statute where there was a prior mortgage came in 1847 when the occupant of land, under a bond for title, failed to pay a mechanic for construction of a building. At the time of the mechanic's suit, the conditional vendee was in possession—default having been made in the payment of consideration. In dismissing the claim of a lien upon the building, the court stated that the lien can operate only to the extent of the interest of the party for whom the work was done and that the bond for title was "at least the equivalent of a mortgage."[5] The holding here was that as against the retained title in the bond for title (which is equivalent to a prior mortgage), the mechanic's lien did not attach even to the building. The only other opinion so holding followed in 1852. A mechanic claiming a lien subsequent to a recorded deed of trust sought to distinguish the preceding case by alleging that the act of 1840 had made the mechanic's lien superior to the prior deed of trust. The court dismissed this contention and held the deed of trust was a prior lien, saying, ". . . we have no hesitation in saying, that the complainant is entitled to the full benefit of his mortgage from the time it was recorded."[6] These are the only two cases holding that a mechanic's lien does not attach to the building, separate from the land, in the face of a prior deed of trust.

Otley v. Haviland[7] is the first in a line of decisions departing from the two preceding opinions. A landowner holding subject to a purchase money deed of trust contracted for a building. The mechanic recovered a judgment, thus giving him a lien on the land and building. At the execution sale Otley purchased the realty. The court held that the security of Haviland's prior deed of trust could not be impaired by the subsequent mechanic's lien but that Otley acquired the building free of all liens and might remove it from the land. The court distinguished the two former opinions as not controlling because the statute prevailing in the earlier case had been "enlarged" by the act of 1840, and the second case, although decided under the same act of 1840, was held not controlling because the court had not been presented with a clear issue of attaching the mechanic's lien to the building separate from the land.

It would seem that the theory underlying the mechanic's lien

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[4]Buck v. Brian, 3 Miss. 874 (1938). The opinion held that the act of 1821 gave a lien upon the building and the recording of the mechanic's contract (apparently unacknowledged) was notice to all subsequent purchasers.

[5]English v. Foote, 16 Miss. 444 (1847).

[6]Hoover v. Wheeler, 23 Miss. 314 (1852).

[7]36 Miss. 19 (1858).

statutes and their liberal interpretation is that one innocent party should not profit at the expense of another innocent party. This theory is not mentioned in any of the opinions—most of which repeat that ". . . the claims of mechanics are favored in law. They are often unlettered men . . . ." Even if it were once true, today it can scarcely be said that mechanics are more unlettered than moneylenders. The plea, then, of counsel for an early mortgagee, though vain, comes with more force for us today:

> "The law, when properly administered, can know no favorites . . . and no man, whatever may be his occupation, can reasonably expect, that his rights shall be more sacredly guarded than the rights of any other member of the community."[8]

Any speculation along these lines is indeed vain, for decisions following the *Otley* case affirm that a mechanic has an unqualified prior lien on the *building* which he may remove, although the building was constructed with notice of a prior recorded mortgage on the land.[9]

In 1932, for the first time, a prior deed of trust on *land* was held inferior to a subsequent mechanic's lien. The facts in *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Investment Co.*[10] were not dissimilar to all the preceding cases except that here the prior deed of trust was security for *future advances for construction.* The builder, desiring to build a hotel, issued $305,000 worth of bonds secured by a first deed of trust on the land and buildings. The deed of trust "at great length" prescribed the method by which proceeds of the bonds would be disbursed to pay for the building. Contemporaneously with the deed of trust, the parties executed a construction agreement which attempted to protect the bondholders by providing: (1) that the trustee would hold the bond proceeds in a trust fund for the benefit of bondholders, subject to being disbursed for construction expenses; and, (2) that one of the trust funds be disbursed until the contractor had completed, pursuant to his contract, work to the point that the balance remaining in the trust fund would exceed the cost of work yet to be completed; and, (3) payment would be made to contractor upon certificates of satisfactory completion issued by the architects—these certificates would be approved by the builder. Builder executed a contract with a contractor for the building "but became indebted also to others for extra labor and materials for the building." After completion of the building, the builder went into hands of a receiver. The opinion of the court re-

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[8]English v. Foote, supra, briefs of counsel, p. 450.

[9]Iney v. White, 50 Miss. 142 (1874); McAllister v. Clopton, 51 Miss. 257 (1875); Big Three Lumber Co. v. Curtis, 130 Miss. 74, 93 So. 487 (1922).

[10]166 Miss. 253, 140 So. 736 (1932).

marked that the statute on its face created a lien on the building and land superior to all except as to subsequent innocent purchasers, but that this Court has long since held that in face of a prior deed of trust the lien is limited to the building alone, citing the *Otley* case and others. This case, because of the "future advances for construction" clause in the deed of trust, is not controlled by these decisions, and this is a case of first impression in Mississippi. Relying upon an A.L.R. annotation,[11] the court found the general rule to be in favor of the prior deed of trust where the mechanics had actual or constructive notice since this is in accord with the equities. But, without finding the mechanics innocent of actual or constructive notice, the court announced the rule for Mssissippi as follows:

> "The lien (of the deed of trust), however, should not be extended any further than its equities require, and therefore should not be given priority, except to the extent that the money secured thereby was actually used in paying for the construction of the building."

The effect of the decision was, (1) the detailed deed of trust and construction agreement, designed to secure the mortgagees a fully paid for building, was defeated by "extras" ordered by the builder outside of the contract arrangement; and, (2) the large and necessary expense of selling the bonds, without which there would have been no building, did not apply "toward construction of the building," and the priority of the deed of trust was further reduced by this amount.

Two more decisions followed under the "future advances for construction" type deed of trust.

First National Bank of Greenville v. Virden[12] presented a classic set of equities to be resolved—two equally innocent and equally deceived claimants. Both mortgagee and contractor had placed full faith in the builder. Contractor, without inquiring into builder's title and without a written contract, began delivering supplies to the job. Bank made all of the loan advances directly to builder and was not aware of the identity of the contractor or his claim until the day before the suit. This case was controlled by the *Weiss* case, the lien of the bank being allowed priority only to the extent of the funds actually going into cost of land or construction. The *Weiss* case omits any reference to *diligence* although the mortagagees took rather elaborate and detailed steps to see that the loan funds paid for the building in full. Thus the question evolves, what does *reasonable diligence entail*?

The third of the "future advances" opinions, *Deposit Guaranty*

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[11] 5 A.L.R. 399 (1920), and 53 A.L.R. 580 (1928).
[12] 208 Miss. 679, 45 So.2d 268 (1950).

& *Trust Co. v. Weaver Lumber Co.*,[13] may not be in point here but the wording of the opinion raises a possible question. Builder traded with contractor for a residence to be financed by a loan from bank. Bank advanced money directly to contractor upon presentation of notes purportedly signed by builder but which the contractor actually forged. The unpaid subcontractors and materialmen gave notice and brought suit under Miss. Code Ann. § 372 (1942), seeking to bind the unpaid contract price in hands of builder. The decision apparently turns upon the finding that since builders did not authorize the bank's payments to contractor, the contract price remained unpaid to that extent. The subcontractor and materialmen were given a prior lien on the house and lot to the extent of the unpaid contract price. The question, however, arises in the discussion of the priority and the extent of the bank's deed of trust—the determination apparently being based upon the holding of the *Weiss* case. The deed of trust was to secure future advances to the contractor or to the builder for contractor's use in building the house.

> "Since advances were made by the bank only to (contractor), the inquiry, under the rule stated in (*Weiss* case and *First National Bank of Greenville* case), was how much of such advances went into the construction of the house, and, therefore, became payments on the contract prices."

The court affirmed the chancellor's fixing of the deed of trust lien at $1,300. "This conclusion rested on (chancellor's) findings that only $1,300 of the bank's advances actually went into the house."

The import of this language seems to be that if the bank had made advances to the builder, it would be protected against subcontractors, but might be unprotected as to the contractor's lien unless it exercised "reasonable diligence" in seeing that funds went into the construction; or, if bank made advancements to contractor, it was charged with absolute responsibility for tracing its funds into actual construction.

Going back to our original hypothetical case, let us assume that the bank has failed to exercise "reasonable diligence" and that the mechanic's lien has taken priority over bank's deed of trust. How much of the undeveloped subdivision does the lien encompass, and how long does the lien survive?

Miss. Code Ann. § 356 (1942) provides that on buildings outside a city, town or village the lien shall extend to and cover one acre of land on which it may stand, and that for buildings inside a city, town or village, ". . . the lien shall extend to and cover the entire curtilage

[13]215 Miss. 183, 60 So.2d 598 (1952).

thereto belonging." The court in construing this language (apparently for the first time) in *Vinson v. Cooley*[14] held that "curtilage" could include more than one platted lot. The mechanic was given a lien on the building and lot on which it stood together with four more lots and fractions of five lots, all of which had been conveyed in a parcel and comprised one piece of property. "The court has a wide discretion in determining the extent of the land about a structure which may be reasonably required for its convenient use and occupation."

The statute gives the mechanic a lien for twelve months from completion of work but this period may be extended by contract. Where a building contract provided for the mechanic to retain a lien until paid in full, the court sustained his lien in a suit brought more than twelve months after completion. The fact that the mechanic's lien was unknown at common law and exists solely by statute does not prevent a "contract lien in the nature of a mortgage." The court raised the question that the contract lien might waive the statutory lien but did not pass upon it, the question not being presented on appeal.[15] Adding such a contract lien to our hypothetical case, we raise the possible defense for the mortgagee that there is a waiver of the statutory lien and that the rules of the *Otley* case and the *Weiss* case are inapplicable. This would be upon the theory that the contract lien, without the statute, would not have a greater standing than the deed of trust, with priority going to the first instrument recorded. On the other hand, if the contract lien does not waive the statutory lien, the mechanic would have a lien upon the house or the house and land which would exist indefinitely. By way of summary, then, it appears that:

1. A prior recorded deed of trust on land takes precedence over a subsequent mechanic's lien as to the land but does not extend to the building on which the mechanic has a superior lien and which he may remove.
2. A "future advances for construction" deed of trust, though prior in time of recording, takes precedence over a subsequent mechanic's lien only to the extent that the secured funds actually were used in the purchase of land or cost of construction.
3. In either type of prior deed of trust, the mechanic's lien possibly may be extended more than twelve months by agreement between builder and mechanic.
4. And the mechanic's lien, if it comes ahead of the deed of trust under the rule of the *Weiss* case, may extend to several lots of a subdivision

[14] 54 So.2d 750 (Miss. 1951).
[15] Pincus v. Collins, 198 Miss. 283, 22 So.2d 361 (1945).

rather than being limited to the platted lot on which the building stands.

How, then, may a mortgagee make a safely secured construction-type loan? If there is a prime contractor, a contractor's performance bond will dispose of the claims of subcontractors and materialmen dealing with him. A contractor's bond would not protect the mortgagee against "extras" ordered by the builder outside of the contract. A possible protective policy here would be to lend no more than the prime contract price and make all advances directly to the "bonded" contractor. Conceivably, however, where the builder already owns a valuable lot it might be desirable to make a loan in excess of the actual cost of construction. Finally, in the everyday situation of a builder who wishes financing to do his own contracting, the lender is in an extremely hazardous position unless he makes all advances directly to the mechanics and materialmen—a practical impossibility.

One more ghost that may someday arise to haunt the prior mortgagee is the possibility of a subsequent federal tax lien taking priority over the "inchoate" lien of the deed of trust.[16] A federal tax claim is without the scope of this article, but, as presented in *U.S. v. Colotta*,[17] is an interesting corollary. The sequence of events was a deed of trust for a construction loan, a mechanic's lien under § 365, and finally, a federal tax lien notice for delinquent income taxes of the builder. The priority of the deed of trust was not questioned by any of the parties and the Government recognized it as being superior to their lien for taxes. The only question presented was the priority of the federal tax lien recorded subsequent to the commencement of suit on the mechanic's lien, but prior to its being reduced to judgment. The unfortunate holding was in favor of the federal tax lien over the mechanic's lien. If we assume, for argument, that the mortgagee could not trace his funds into the cost of construction, then the federal tax lien would come ahead of both the mechanic's lien and the deed of trust.

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[16]Cross, Federal Tax Claims, 29 Miss. L.J. 444, p. 551 (1958).

[17]U.S. v. Colotta, 224 Miss. 33, 79 So.2d 474 (1955); *reversed on certiorari*, 350 U.S. 808 (1955); *reversed*, 224 Miss. 33, 86 So.2d 19 (1956).

STATE SOVEREIGNTY AND THE FOUNDING FATHERS—II†

*William P. Murphy**

THE PENNSYLVANIA DELEGATES

1. *Thomas Mifflin.* Titular head of the Pennsylvania delegation, Mifflin was a prosperous merchant, son-in-law of Robert Morris, and a graduate of what is now University of Pennsylvania. Although he championed colonial rights, he was slow to take a stand for independence. A delegate to both the First and Second Continental Congresses, he was quartermaster-general of the Continental army for almost three years, from which post he was relieved for inefficiency. He was a member of the cabal which sought to elevate Gates above Washington, but later resumed his friendship with Washington. He served briefly as president of Congress in 1783-84. During the Convention Mifflin made no recorded speeches, but he did sign and support the Constitution. Governor of Pennsylvania between 1790 and 1799, he supported national intervention in the Whiskey Rebellion in western Pennsylvania in 1793, but managed also during his tenure to accomodate himself to the increasing influence of Republicanism. His career was marked more by success in bending with the wind than by any fixed principles of government.

2. *Benjamin Franklin.* This remarkable man—printer, author, inventor, scientist, philanthropist, diplomat and statesman—was the oldest delegate present at eighty-one years. A true cosmopolitan, Franklin had been for almost twenty years prior to the Revolution, as resident agent in England for Pennsylvania and several other states, a diligent advocate of colonial interests. Returning in 1775, he was a delegate to the Second Continental Congress, a signer of the Declaration of Independence, and was then sent to France where he represented Congress from 1776 to 1781. He was one of the commissioners who negotiated the peace treaty with Britain. Returning again to America in 1785, he was elected president of the executive council of Pennsylvania.

Franklin was the first American to offer a plan of union for the colonies. In 1754, at the Albany conference of delegates of the northern colonies called by the Board of Trade to negotiate with the Indians, Franklin had suggested a largely self-governing confederation. This

†This is the second installment of an article which began in 30 Miss. Law Journal 135 (1959). On line 12 on page 141 of the earlier article, "a threat for power" should read "a thirst for power."

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plan would have created a representative assembly with powers of war and peace, to regulate trade, and to levy and collect taxes, with a single executive appointed by the Crown. Franklin's plan was much too far ahead of the times, and neither the Crown nor the colonies approved his proposal, the one because it was too democratic, the other because it was too centralized. Later, in the Continental Congress, Franklin again was ahead of his contemporaries, offering a plan of union in 1775, a full year before Congress was ready to consider such a project.

It is clear that considerations of state sovereignty weighed not at all with Franklin. He regarded the states as being of even less importance than did the delegates who advocated representation based on population. Thus on June 11 he stated: "I must own that I was originally of opinion it would be better if every member of Congress, or our national council, were to consider himself rather as a representative of the whole, than as an agent for the interests of a particular State; in which case the proportion of members for each State would be of less consequences, and it would not be very material whether they voted by States or individually. But as I find this is not to be expected, I now think the number of Representatives should bear some proportion to the number of the Represented; and that the decisions should be by the majority of members, not by the majority of states. This is objected to from an apprehension that the greater States would then swallow up the smaller. I do not at present clearly see what advantage the greater states could propose to themselves by swallowing the smaller, and therefore do not apprehend they would attempt it."[84] And on June 11 he declared: "An honorable gentleman has, to avoid this difficulty, hinted a proposition of equalizing the States. It appears to me an equitable one, and I should, for my own part, not be against such a measure, if it might be found practicable. If therefore in such an equal division, it should be found necessary to diminish Pennsylvania, I should not be averse to the giving a part of it to New Jersey, and another to Delaware."[85] Franklin was a supporter of the Congressional negative over state laws, as revealed on May 31 when the negative was expanded on his motion: ". . . the words 'or any treaties subsisting under the authority of the Union,' being added after the words 'contravening &c. the articles of the Union;' on motion of Dr. Franklin, were agreed to without debate or dissent."[86] And Franklin's concurrence in the nationalist positions taken by the Convention in its early weeks is evidenced by Luther Martin's report to the Maryland legislature, already referred to previously in the discussion of Washington.

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84 1 Records 197.
85 1 Records 199.
86 1 Records 54.

Franklin's primary role in the Convention was not the contribution of substantive provisions or the formulation of particular language. Most of his specific suggestions, in fact, were rejected. His value and service derived rather from the veneration and respect with which he was regarded, and the wisdom, detachment and humor with which he counseled the necessity for a spirit of accomodation, harmony and compromise. More than once a conciliatory speech by Franklin, which frequently had to be read for him by James Wilson, assisted the Convention in reconciling divergent opinions. A prime example of Franklin's ability to engender compromise was in the very area of dispute over proportional or equal state representation, and his proposal again revealed his attitude that attachment to state was something which had to be lived with rather than valued. On June 30 Franklin proposed: " 'That the Legislatures of the several States shall choose and send an equal number of Delegates, namely ..... who are to compose the 2d branch of the General Legislature—That in all cases or questions wherein the Sovereignty of individual States may be affected, or whereby their authority over their own Citizens may be diminished, or the authority of the General Government within the several States augmented, each State shall have equal suffrage."[87] And when the compromise reported back to the Convention, recommending proportional representation in the lower house and equal representation in the upper, Madison recorded that "This report was founded on a motion in the Committee made by Dr. Franklin. It was barely acquiesced in by the members from the States opposed to an equality of votes in the 2d branch and was evidently considered by the members on the other side, as a gaining of their point."[88] That Franklin regarded this merely as the best possible bargain under the circumstances is indicated again by Luther Martin who later stated that "the Honorable President of Pennsylvania was a member of the committee of compromise, and there advocated the right of the large States to an inequality in both branches, and only ultimately conceded it in the second branch on the principle of conciliation, when it was found no other terms would be accepted."[89] Although not in complete agreement with all the provisions of the final document, Franklin signed the Constitution and in a speech which exemplified his whole philosophy of accepting the best that was practically possible, advocated its unanimous acceptance by the delegates.

3. *George Clymer.* A wealthy Philadelphia merchant who married the daughter of a wealthy merchant, Clymer even so was among the

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87 1 Records 489.
88 1 Records 526.
89 3 Records 190.

first to advocate complete independence, and was immensely proud of having signed the Declaration. He was in Congress three times during the war, where his knowledge of business affairs made him useful on committees dealing with matters of finance and commerce. He spoke little during the Convention, but supported the nationalist positions which were consistently taken by the Pennsylvania delegation. A signer of the Constitution, Clymer served in the First Congress as a Federalist.

4. *Thomas Fitzsimmons.* Another wealthy Philadelphia merchant who married a merchant's daughter, Fitzsimmons served in Congress in 1782 and later in the Pennsylvania legislature. In the Convention, he went along with the delegation, favored restricting the suffrage to freeholders, spoke but little, and then on such matters as harbor improvements and aid to manufacturing. He signed the Constitution and was a Federalist member of the House of Representatives from 1789 to 1795, supporting the entire Federalist program, especially the Hamilton financial measures. In 1810 he was on a committee of Philadelphia businessmen seeking to re-charter the bank of the United States.

5. *Jared Ingersoll.* A graduate of Yale, Ingersoll was probably the ablest jury lawyer in Philadelphia. He was elected to Congress in 1780, and from then on urged the revision or replacement of the Articles. Inexplicably, he took no active part in the Convention, so far as the records show. Ingersoll later represented the state of Georgia in the famous case of *Chisholm v. Georgia,* and argued against Hamilton in *Hylton v. United States.* This paid advocacy was contrary to his private convictions, however, which were conservative and nationalist. He regarded the principles of Republicanism as a betrayal of the Constitution, and in politics was a confirmed Federalist, even after Jeffersonianism had triumphed in Pennsylvania. Although he was put forward for vice-president by Pennsylvania Federalists in 1812, Ingersoll's principal interest was always the practice of law rather than politics.

6. *Robert Morris.* Born in England, Morris by the time of the Revolution and for twenty years thereafter was the foremost merchant, financier, speculator, and broker in America, whose far-flung economic interests reached into every section of the country and closely connected him with the most important men of the time. His enormous financial acumen was utilized in the cause of independence both in Pennsylvania and in Congress. When economic affairs reached their most critical point early in 1781, Morris was appointed by Congress as superintendent of finance, and given virtually dictatorial economic powers. By almost miraculous manipulation, Morris managed to keep the armies in the field supplied, as a result of which service (in addition to enriching himself in the process) he has forever since been known as "the financier of the Revolution." Morris' efforts during the war to obtain

money and supplies from sovereign states, as well as his natural conservatism, made him forever after a confirmed advocate of a strong central government. As a delegate to the Annapolis convention he supported the drive to achieve one. Morris was host to Washington during the Convention, nominated him for presiding officer, but did not participate in the debates. He was offered the position of Secretary of the Treasury in Washington's cabinet, but declined. Instead he became one of Pennsylvania's first Senators, and a dedicated Federalist who worked closely with Hamilton in formulating and effectuating his financial program.

7. *Gouverneur Morris.* Born into the landed aristocracy of New York, Morris graduated from King's College, then became a lawyer and politician. As a conservative, he sought to preserve the union with Britain, but supported independence when the break came. He was a member of the New York provincial Congress, a member of the New York constitutional convention, and a delegate to Congress in 1778-79. Defeated for reelection, he moved to Philadelphia, where he quickly became prominent. From 1781 to 1785 he served as chief assistant to Robert Morris, to whom he was not related.

In the Convention Morris was one of the strongest nationalists. Brilliant, witty, suave, eloquent, and of unfailing self-assurance, he was also the most frequent speaker in the debates. He was strongly in favor of representation based on population. Thus, on May 28 "It was pressed by Gouverneur Morris and favored by Robert Morris and others from Pennsylvania, that the large states should unite in firmly refusing to the small states an equal vote, as unreasonable, and as enabling the small states to negative every good system of Government, which must in the nature of things, be founded on a violation of that equality."[90] And on May 30 Morris stated that this principle was "so fundamental an article in a national government that it could not be dispensed with."[91] Consequently, he was against any compromise on the question. On July 2 "He perceived that the first branch was to be chosen by the people of the States; the second by those chosen by the people. Is not here a Government by the states? A government by compact between Virginia in the first and second branch; Massachusetts in the first and second branch, etc. This is going back to mere treaty. It is no Government at all. It is altogether dependent on the states, and will act over again the part which Congress has acted. A firm Government alone can protect our liberties."[92] On the same day Yates' notes record him as stating that "They will still have local and state prejudices. A govern-

[90] 1 Records 11.
[91] 1 Records 37.
[92] 1 Records 514.

ment by compact is no government at all. You may as well go back to your congressional federal government, where, in the character of ambassadors, they may form treaties for each state."[93]

When the compromise committee made its report, Morris was still adamant and in expressing his opposition uttered some of the strongest language against the states which was used in the Convention. On July 5 he declared that "He came here as a representative of America; he flattered himself he came here in some degree as a representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he has heard, he should suppose that we were assembled to truck and bargain for our particular states. He cannot descend to think that any gentlemen are really actuated by these views . . . . As the second branch is now constituted, there will be constant disputes and appeals to the states which will undermine the General Government and control and annihilate the first branch. What results? They will immediately declare that their states will not abide by the decision, and make such representations as will produce that effect. The same may happen as to Virginia and other states. Of what avail then will be what is on paper. State attachments, and state importance have been the bane of this Country. We cannot annihilate; but we may perhaps take out the teeth of the serpents. He wished our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular spot."[94]

On July 7, he stated that he "had no resolution unalterably fixed except to do what should finally appear to him right. He was against the Report because it maintained the improper Constitution of the second branch. It made it another Congress, a mere whisp of straw. It had been said (by Mr. Gerry) that the new Government would be partly national, partly federal; that it ought in the first quality to protect individuals; in the second, the states. But in what quality was it to protect the aggregate interest of the whole? Among the many provisions which had been urged, he had seen none for supporting the dignity and splendor of the American Empire. It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views; in like manner as the general interests of states had been sacrificed to those of the counties. What is to be the check in the Senate? None, unless it be to keep the majority of the people from injuring particular states. But particular states ought to be injured for

93 1 Records 518.
94 1 Records 529.

the sake of a majority of the people, in case their conduct should deserve it. Suppose they should insist on claims evidently unjust, and pursue them in a manner detrimental to the whole body. Suppose they should give themselves up to foreign influence. Ought they to be protected in such cases? They were originally nothing more than colonial corporations. On the Declaration of Independence, a Government was to be formed. The small states, aware of the necessity of preventing anarchy, and taking advantage of the moment, extorted from the large ones an equality of votes. Standing now on that ground, they demand under the new system greater rights as men, than their fellow citizens of the large states. The proper answer to them is that the same necessity of which they formerly took advantage does not now exist, and that the large states are at liberty now to consider what is right, rather than what may be expedient. We must have an efficient Government and if there be an efficiency in the local Governments the former is impossible . . . ." Commenting that at the time Germany was weak because there was more energy in the local authorties than in the general government, Morris continued: "Do gentlemen wish this to be the case here? Good God, sir, is it possible they can so delude themselves? What if all the charters and constitutions of the states were thrown into the fire, and all their demagogues into the ocean? What would it be to the happiness of America?"[95] Paterson's notes on Morris the same day read: "State-Policy not a proper object for a vigorous Government. In proportion to the vigour and strength of the state governments will be the feebleness of the general Government. We must have it in view eventually to lessen and destroy the state limits and authorities."[96] Even after the compromise was accepted by the Convention, on July 10 "Mr. Govr. Morris regretted the turn of the debate. The states, he found, had many representatives on the floor. Few, he fears, were to be deemed the representatives of America."[97]

Morris' nationalism expressed itself in other ways. On July 17 he opposed a motion intended to protect the power of the states over their internal police, stating that "The internal police, as it would be called and understood by the states, ought to be infringed in many cases, as in the case of paper money and other tricks by which citizens of other states may be affected."[98] He was also opposed to a motion to require invitation by a governor before the national government could intervene to subdue rebellion in a state, arguing that "the executive may possibly be at the head of the rebellion. The general government should

951 Records 551.
961 Records 556.
971 Records 567.
982 Records 26.

enforce obedience in all cases where it may be necessary."[99] Morris had contempt for democracy, believed in property qualifications for voting, and also advocated life tenure for the president and for senators. He foresaw that a strong national government would be opposed by state interests. "When it [the Constitution] first appears, with the sanction of this Convention, the people will be favorable to it. By degrees the state officers and those interests in the state governments will intrigue and turn the popular current against it."[100] On July 2 he stated that "It should be considered too how the scheme could be carried through the states. He hoped there was strength of mind enough in this House to look truth in the face. He did not hesitate therefore to say that loaves and fishes must bribe the demagogues. They must be made to expect higher offices under the general than the state governments. A Senate for life will be a noble bait. Without such captivating prospects, the popular leaders will oppose and defeat the plan."[101] This anxiety lest the Constitution not become operative led him to take apparently inconsistent positions. Thus, he opposed the Congressional negative on state laws, but on grounds that it would create too much opposition in the states and unnecessarily so. On July 17 "Mr. Govr. Morris opposed this power as likely to be terrible to the states, and not necessary, if sufficient Legislative authority should be given to the General Government."[102] Later the same day "Mr. Govr. Morris was more and more opposed to the negative. The proposal of it would disgust all the states. A law that ought to be negatived will be set aside in the Judiciary department and, if that security should fail, may be repealed by a National law."[103] Likewise, on September 15 "Mr. Gouverneur Morris moved to annex a further proviso 'that no state without its consent shall be deprived of its equal suffrage in the Senate,' " Madison's notes adding at this point, "This motion being dictated by the circulating murmurs of the small states . . . ."[104]

Morris was a member of the Committee on Style to whom was given the task of putting the decisions of the Convention in final form. According to himself and Madison, Morris was the author of the language of the Constitution as we now have it. Writing to Timothy Pickering in 1814, Morris in referring to the Constitution stated that "That instrument was written by the fingers which write this letter."[105] And Madison, in 1831, wrote to Jared Sparks: "The finish given to

992 Records 317.
1002 Records 478.
1011 Records 513.
1022 Records 27.
1032 Records 28.
1042 Records 631.
1053 Records 420.

the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having been probably handed over to him by the Chairman of the Committee, himself a highly respectable member, with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved."[106] After the Convention, Morris went to France on business in 1789, and while there was named by Washington as minister in 1792, serving until recalled at the request of France in 1794. Later he filled an unexpired Senate term in 1800-02. He regarded the ascendancy of Jefferson and Republicanism with abhorrence, denounced the embargo, and condemned the war of 1812. Eventually, his hatred of what he regarded as a departure from the principles of the Constitution induced him to approve of the Hartford Convention.

8. *James Wilson.* Born in Scotland where he attended the Universities of St. Andrews and Edinburgh, Wilson came to America in 1763. He became a successful practicing lawyer in Philadelphia, and also a profound student of history and political philosophy. He was a member of the provincial congress in Pennsylvania, and an opponent of the 1776 state constitution enacted by the radicals. His role in the Contiental Congress in connection with the drafting of the Articles of Confederation has already been noted. Both then and in subsequent terms in Congress he consistently sought to increase the powers of the central government.

In the Convention Wilson's contribution was probably second only to that of Madison, and like Madison, Wilson was an ardent nationalist. He believed that the national sentiments originally engendered by independence had been stifled by the local interests that arose quickly when the states were formed. On June 8 he stated that "Among the first sentiments expressed in the first Congress one was that Virginia is no more, that Massachusetts is no more, that Pennsylvania is no more, etc. We are now one nation of brethren. We must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn. No sooner were the state governments formed than their jealousy and ambition began to display themselves. Each endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the Articles of Confederation through Congress and compare the first and last draft of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual control in the whole over its parts. What danger is there that the whole will unnecessarily

[106] 3 Records 499.

sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?[107]. . . "The original draft of confederation was drawn on the first ideas, and the draft concluded on how different!"[108]

In Wilson's conception of what the new government should be, there was a necessary and useful role for the states. They should therefore be continued in existence for the accomplishment of subordinate purposes. Early in the Convention, on June 6, the record states "Mr. Wilson would not have spoken again, but for what had fallen from Mr. Read; namely, that the idea of preserving the state governments ought to be abandoned. He saw no incompatability between the national and state governments, provided the latter were restrained to certain local purposes; or any probability of their being devoured by the former. In all confederated systems ancient and modern the reverse had happened; the generality being destroyed gradually by the usurpations of the parts composing it."[109] The next day, June 7, Wilson described the states as satellities of a national sun. "He did not see the danger of the states being devoured by the National Government. On the contrary, he wished to keep them from devouring the National Government. He was not however for extinguishing these planets as was supposed by Mr. D..... neither did he on the other hand, believe that they would warm or enlighten the sun. Within their proper orbits they must still be suffered to act for subordinate purposes (for which their existence is made essential by the great extent of our Country.)"[110] Yates recorded him the same day as follows: "Mr. Wilson. The state governments ought to be preserved—the freedom of the people and their internal good police depends on their existence in full vigor—but such a government can only answer local purposes ."[111]

And on June 19: "Mr. Wilson observed that by a National Government he did not mean one that would swallow up the State Governments as seemed to be wished by some gentlemen. He was tenacious of the idea of preserving the latter. He thought, contrary to the opinion of Col. Hamilton that they might not only subsist but subsist on friendly terms with the former. They were absolutely necessary for certain purposes which the former could not reach. All large Governments must be subdivided into lesser jurisdictions; as examples he mentioned Persia, Rome, and particularly the divisions and subdivisions of England by Alfred."[112] Yates recorded him the same day as saying "I

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[107] 1 Records 166.
[108] 1 Records 170.
[109] 1 Records 137.
[110] 1 Records 153.
[111] 1 Records 157.
[112] 1 Records 322.

am for a national government, though the idea of federal is, in my view, the same. With me it is not a desirable object to annihilate the state governments, and here I differ from the honorable gentleman from New York. In all extensive empires a subdivision of power is necessary. Persia, Turkey and Rome, under its emperors, are examples in point. These, although despots, found it necessary. A general government, over a great extent of territory, must in a few years make subordinate jurisdictions."[113]

Wilson was vehemently opposed, however, to the states having equal representation in the national legislature, viewing this as being inconsistent with a truly national government. Thus, on May 31 he stated that "He also thought it wrong to increase the weight of the state legislatures by making them the electors of the National Legislatures. All interference between the general and local governments should be obviated as much as possible. On examination it would be found that the opposition of states to federal measures had proceeded much more from the officers of the states, than from the people at large."[114] And again on June 25, "He was opposed to an election by the state legislatures. In explaining his reasons it was necessary to observe the twofold relation in which the people would stand. 1. as citizens of the General Government. 2. as citizens of their particular state. The General Government was meant for them in the first capacity; the state governments in the second. Both Governments were derived from the people—both meant for the people—both therefore ought to be regulated on the same principles. The same train of ideas which belonged to the relation of the citizens to their state governments were applicable to their relations to the General Government and in forming the latter, we ought to proceed, by abstracting as much as possible from the idea of state governments. With respect to the province and objects of the General Government they should be considered as having no existence. The election of the second branch by the Legislatures, will introduce and cherish local interests and local prejudices. The General Government is not an assemblage of states, but of individuals for certain political purposes—it is not meant for the states, but for the individuals composing them: The *individuals,* therefore, not the *states,* ought to be represented in it: . . . ."[115]

Nor did he consider equal representation necessary as any political protection to the states. On June 21 Wilson said: "It was asked how the general Government and individuality of the particular states could be reconciled to each other; and how the latter could be secured

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[113] 1 Records 328.
[114] 1 Records 49.
[115] 1 Records 405.

against the former? Might it not, on the other side, be asked how the former was to be secured against the latter? It was generally admitted that a jealously and rivalship would be felt between the General and particular Governments. As the plan now stood, tho' indeed contrary to his opinion, one branch of the General Government (the Senate or second branch) was to be appointed by the state legislatures. The state legislatures, therefore, by this participation in the General Government would have an opportunity of defending their rights. Ought not a reciprocal opportunity to be given to the General Government of defending itself by having an appointment of some one constituent branch of the state Governments. If a security be necessary on one side, it would seem reasonable to demand it on the other. But taking the matter in a more general view, he saw no danger to the states from the General Government. In case a combination should be made by the large ones it would produce a general alarm among the rest; and the project would be frustrated. But there was no temptation to such a project. The states having in general a similar interest in case of any proposition in the National Legislature to encroach on the state legislatures, he conceived a general alarm would take place in the National Legislature itself, that it would communicate itself to the state legislatures, and would finally spread among the people at large. The General Government will be as ready to preserve the rights of the states as the latter are to preserve the rights of individuals; all the members of the former, having a common interest, as representatives of all the people of the latter, to leave the state governments in possession of what the people wish them to retain. He could not discover, therefore, any danger whatever on the side from which it had been apprehended. On the contrary, he conceived that in spite of every precaution the General Government would be in perpetual danger of encroachments from the state governments."[116]

He elaborated this view on July 14. "The justice of the general principle of proportional representation has not in argument at least been yet contradicted. But it is said that a departure from it so far as to give the states an equal vote in one branch of the Legislature is essential to their preservation. He had considered this position maturely, but could not see its application. That the states ought to be preserved he admitted. But does it follow that an equality of votes is necessary for the purpose? Is there any reason to suppose that if their preservation should depend more on the large than on the small states, the security of the states against the General Government would be diminished? Are the large states less attached to their existence, more like-

1161 Records 355.
1172 Records 10.

ly to commit suicide, than the small? An equal vote, then, is not necessary as far as he can conceive; and is liable, among other objections, to this insuperable one: the great fault of the existing Confederacy is its inactivity. It has never been a complaint against Congress that they governed overmuch. The complaint has been that they have governed too little. To remedy this defect we were sent here. Shall we effect the cure by establishing an equality of votes, as is proposed? No, this very equality carries us directly to Congress; to the system which it is our duty to rectify. The small states cannot indeed act, by virtue of this equality, but they may control the Government as they have done in Congress. This very measure is here prosecuted by a minority of the people of America. Is then the object of the Convention likely to be accomplished in this way? Will not our constituents say, we sent you to form an efficient Government and you have given us one more complex indeed, but having all the weakness of the former Government. He was anxious for uniting all the states under one Government."[117]

Wilson foresaw that state officers and state interests would feel a sense of rivalry against the national government. On June 6 he declared that "The opposition was to be expected he said from the governments, not from the citizens, of the states. The latter had parted as was observed by Mr. King with all the necessary powers; and it was immaterial to them, by whom they were exercised, if well exercised. The state officers were to be losers of power. The people, he supposed, would be rather more attached to the National Government than to the state governments as being more important in itself, and more flattering to their pride. There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity for bad men to intrigue themselves into office."[118] And on June 20 "He insisted that a jealousy would exist between the state legislatures and the General Legislature, observing that the members of the former would have views and feelings very distinct in this respect from their constituents. A private citizen of a state is indifferent whether power be exercised by the General or state legislatures, provided it be exercised most for his happiness. His representative has an interest in its being exercised by the body to which he belongs. He will therefore view the National Legislature with the eye of a jealous rival. He observed that the addresses of Congress to the people at large had always been better received and produced greater effect than those made to the legislatures."[119]

In such circumstances national supremacy was essential. On June 7 "He hoped that the national government would be independent of

[118] 1 Records 133.
[119] 1 Records 343.

state governments, in order to make it vigorous, and therefore moved that the above resolution be postponed, and that the convention in its room adopt the following resolve: That the second branch of the national legislature be chosen by districts, to be formed for that purpose."[120] And on June 9 he stated that "We have been told that each state being sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil government? He can not. As little can a sovereign state, when it becomes a member of a federal Government. If New Jersey will not part with her sovereignty, it is in vain to talk of Government. A new partition of the states is desirable, but evidently and totally impracticable."[121] On June 21 he declared "But where the one government clashed with the other, the state government ought to yield, as the preservation of the general interest must be preferred to a particular. But let us try to designate the powers of each, and then no danger can be apprehended, nor can the general government be possessed of any ambitious views to encroach on the state rights."[122] And on June 22: "Mr. Wilson was against the compensation as circumstances would change and call for a change of the amount. He thought it of great moment that the members of the National Government should be left as independent as possible of the state governments in all respects."[123]

But where national power ended and state rights began was to be determined by the national government, and Wilson was therefore in favor of the Congressional negative. Thus, on June 8, "Mr. Wilson would not say what modifications of the proposed power might be practicable or expedient. But however novel it might appear, the principal of it, when viewed with close and steady eye, is right. There is no instance in which the laws say that the individuals should be bound in one case, and at liberty to judge whether he will obey or disobey in another. The cases are parallel, abuses of the power over the individual person may happen as well as over the individual states. Federal liberty is to states, what civil liberty is to private individuals. And states are not more unwilling to purchase it by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of the personal sovereignty, which he enjoys in a state of nature. A definition of the cases in which the negative should be exercised is impracticable. A discretion must be left on one side or the other. Will it not be most safely lodged on the side of the National

[120] 1 Records 157.
[121] 1 Records 180.
[122] 1 Records 363.
[123] 1 Records 373.

Government?"[124] And on August 23, referring to the negative "Mr. Wilson considered this as the key-stone wanted to complete the wide arch of Government we are raising. The power of self-defense had been urged as necessary for the state governments. It was equally necessary for the General Government. The firmness of judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed."[125]

More, probably, than most of the delegates, Wilson had a vision of the America which was to be. On June 25 he said that "When he considered the amazing extent of country—the immense population which is to fill it, the influence which the Government we are to form will have, not only on the present generation of our people and their multiplied posterity, but on the whole globe, he was lost in the magnitude of the object."[126] And in this great future "He could not persuade himself that the state governments and sovereignties were so much the idols of the people, nor a National Government so obnoxious to them, as some supposed. Why should a National Government be unpopular? Has it less dignity? Will each citizen enjoy under it less liberty or protection? Will a citizen of Delaware be degraded by becoming a Citizen of the United States? Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their government? No sir, it is from the National councils that relief is expected. For these reasons he did not fear, that the people would not follow us into a National Government and it will be a further recommendation of Mr. R's plan that it is to be submitted to them and not to the legislatures, for ratification."[127] Not only an apostle of nationalism, Wilson was also far in advance of most of his contemporaries in his confidence in democracy. He thought that not only the members of both houses of Congress, but also the President, should be elected by popular vote.

After the Convention was over, Wilson was the foremost advocate of ratification in Pennsylvania. In 1789 he was appointed an associate justice of the Supreme Court, a post which he held until his death. His opinion in *Chisholm v. Georgia* was a ringing affirmation of the Constitution as an ordinance of the American people creating a national government to which the sovereignty of the states had been subordinated.

THE NORTH CAROLINA DELEGATES

1. *Alexander Martin.* A graduate of Princeton, a planter, mer-

1241 Records 166.
1252 Records 391.
1261 Records 405.
1271 Records 253.

chant and politician, Martin had been dismissed from the army for cowardice, but was elected governor in 1782 and served three terms. Although the titular head of the delegation, he was inconspicuous during the Convention. He was defeated for election as a delegate to the ratification convention, but was reelected governor. From a moderate Federalist, he changed as the political winds in his state changed, and became a Republican. Elected to the Senate in 1792, his vote for the Alien and Sedition laws contributed to his failure of reelection, but he continued his office-holding career in the state legislature.

2. *Richard Dobbs Spaight.* Son of a wealthy planter, Spaight was educated in Ireland, completing his studies at the University of Glasgow. Returning to North Carolina in 1778, he went to the state legislature, had a brief military career, served in Congress and became speaker of the state legislature. He regarded the assumption of judicial review by the Carolina courts as a usurpation. In the Convention he spoke seldom, but believed in strengthening the government. Writing to James Iredell during the Convention, he stated that "It is not probable that the United States will in the future be so ideal as to risk their happiness upon the unanimity of the whole, and thereby put it in the power of one or two states to defeat the most salutary propositions, and prevent the Union from rising out of that contemptible situation to which it is at present reduced."[128] Spaight signed the Constitution, was a member of the state convention where he actively urged ratification. Subsequently he became a Republican, serving as governor and Congressman.

3. *Hugh Williamson.* A graduate of the College of Philadelphia, Williamson was successively a minister, a mathematics professor, a doctor, a merchant and a politician. During the 1780's he served two terms both in the state legislature and in Congress, and was a delegate to the Annapolis convention. At Philadelphia he was the most active of the North Carolina delegates. He was in favor of proportional representation and thought the small states had nothing to fear from it. Thus, on June 9 "Mr. Williamson illustrated the cases by a comparison of the different states to counties of different sizes within the same state, observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former."[129] And on June 28 "Mr. Williamson thought that if any political truth could be grounded on mathematical demonstration, it was that if the states were equally sovereign now, and parted with equal proportions of sovereignty, that they would remain equally sovereign. He could not

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1283 Records 68.
1291 Records 180.

comprehend how the smaller states would be injured in the case, and wished some gentleman would vouchsafe a solution of it."[130]

Although he advocated a stronger government, "Doctor Williamson professed himself a friend to such a system as would secure the existence of the state governments. The happiness of the people depended on it."[131] He also thought that "the state legislatures ought to possess independent powers in cases purely local, and applying to their internal policy."[132] Consequently, on the Congressional negative, he thought that "The national legislature ought to possess the power of negativing such laws only as will encroach on the national government."[133] But he was against giving Congress an unlimited negative on all laws it thought improper, since "that might restrain the states from regulating their internal police."[134] Apparently, he was in favor of judicial review, since he stated with reference to the proposal to include an ex post facto clause, "Such a prohibitory clause is in the Constitution of North Carolina, and though it had been violated, it has done good there and may do good here, because the judges can take hold of it."[135] Williamson signed the Constitution and worked for its ratification in North Carolina. After serving in Congress from 1789 to 1793, he retired to devote himself to literary and scientific pursuits.

4. *William Richardson Davie.* Born in England, graduated from Princeton, Davie saw continuous military service during the Revolution. He then went into law and politics, building a lucrative practice, serving in the state legislature from 1786 to 1798 and as governor in 1798. In the Convention Davie participated but little in the debates. On the question of representation in Congress, he stated on June 30: "The fact was that the local prejudices and interests which could not be denied to exist, would find their way into the national councils whether the representatives should be chosen by the legislatures or by the people themselves. On the other hand, if a proportional representation was attended with insuperable difficulties, the making the Senate the representative of the states looked like bringing us back to Congress again, and shutting out all the advantages expected from it. Under this view of the subject he could not vote for any plan for the Senate yet proposed. He thought that in general there were extremes on both sides. We were partly federal, partly national in our union. And he did not see why the government might not in some respects operate on the

130 1 Records 445.
131 1 Records 407.
132 1 Records 171.
133 1 Records 169.
134 1 Records 165.
135 2 Records 376.

states, in others on the people."[136] As for his own idea as to the proper basis of representation, "he seemed to think that wealth or property ought to be represented in the second branch, and numbers in the first branch."[137]

Although he left the Convention in August and was not present for the signing, Davie favored the Constitution and very actively fought for its ratification in North Carolina. A confirmed Federalist in a Republican state, as governor he denounced the Virginia and Kentucky Resolutions, and his strong opposition to Jeffersonianism eventually eliminated him from politics.

5. *William Blount.* A paymaster during the war, Blount was four times a member of the lower house of the North Carolina legislature, once as speaker, twice a member of the state senate, and twice a member of Congress. During the Convention he took no part in the debates, and was absent for over a month during July and August. In July he wrote to his brother that "I must confess, notwithstanding all I heard in favor of this system, I am not in sentiment with my colleagues, for as I have said before, I still think we shall ultimately end not many years just being separate and distinct governments perfectly independent of each other."[138] On September 17, the day of the signing the Constitution, Hugh Williamson referred to Blount as being one of the members "who disliked the Constitution."[139] Blount did sign, but stated that it was not to indicate approval, but merely to "attest the fact that the plan was the unanimous act of the states in Convention."[140] He did, however, vote for ratification in the North Carolina convention. Blount later had a political career in Tennessee, where he achieved the dubious distinction of being the only man ever expelled from the U. S. Senate.

THE DELAWARE DELEGATES

1. *George Read.* A lawyer, Read had been a member of both the First and Second Continental Congresses, and had signed the Declaration of Independence. He was active in the Delaware constitutional convention in 1776 and in the legislature thereafter, and was a delegate to the Annapolis convention.

Throughout the Convention Read was outspoken against the sovereignty of the states. On June 6 he declared that "Too much attachment is betrayed to the state governments. We must look beyond their continuance. A National Government must soon of necessity swallow all of them up. They will soon be reduced to the mere office of

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136 1 Records 488.
137 1 Records 542.
138 4 Records 71.
139 2 Records 645.
140 2 Records 646.

electing the national Senate. He was against patching up the old federal system, he hoped the idea would be dismissed. It would be like putting new cloth on an old garment. The confederation was founded on temporary principles. It cannot last; it cannot be amended. If we do not establish a good government on new principles, we must either go to ruin, or have the work to do over again. The people at large are wrongly suspected of being averse to a General Government. The aversion lies among interested men who possess their confidence."[141] King recorded him the same day as follows: "Read—We must come to a consolidation—The state governments must be swept away—We had better speak out—the idea that the people will not approve perhaps is a mistake—The state magistrates may disagree but the people are with us—"[142]

Speaking on a resolution for "guarantying republican government and territory to each state," "Mr. Read disliked the idea of guarantying territory. It abetted the idea of distinct states which would be a perpettual source of discord. There can be no cure for this evil but in doing away with states altogether and uniting them all into one great Society."[143] And according to Yates' notes, "Mr. Read against the resolve *in toto*. We must put away state governments, and we will then remove all cause of jealousy. The guarantee will confirm the assumed rights of several states to lands which do belong to the confederation."[144] And on June 26 "Mr. Read wished it to be considered by the small states that it was their interest that we should become one people as much as possible, that state attachments should be extinguished as much as possible, that the Senate should be so constituted as to have the feelings of citizens of the whole."[145]

Again on June 29, Read stated that "He should have no objection to the system if it were truly national, but it has too much of a federal mixture in it. The little states, he thought, had not much to fear. He suspected that the large states felt their want of energy, and wished for a General Government to supply the defect. He was not however so selfish as not to wish for a good General Government. In order to obtain one the whole states must be incorporated. If the states remain, the representatives of the large ones will stick together, and carry every thing before them. The executive also will be chosen under the influence of this partiality, and will betray it in his administration. These jealousies are inseparable from the scheme of leaving the states in existence. They must be done away. The ungranted lands also which have been assumed by particular states must also be given up. He repeated his ap-

[141] 1 Records 136.
[142] 1 Records 143.
[143] 1 Records 202.
[144] 1 Records 206.
[145] 1 Records 424.

probation of the plan of Mr. Hamilton, and wished it to be substituted in place of that on the table."[146] On July 10 Read said that "He hoped the objects of the General Government would be much more numerous than seemed to be expected by some gentlemen, and that they would become more and more so."[147] And on August 8, speaking against a state residence requirement for Congressmen, "Mr. Read reminded him that we were now forming a National Government and such a regulation would correspond little with the idea that we were one people."[148]

Read naturally was in favor of the Congressional negative, and also advocated life membership for Senators. A signer of the Constitution, Read was instrumental in bringing about its approval in Delaware, which became the first state to ratify. One of Delaware's first Senators, Read was a staunch Federalist. He resigned in 1793 to become chief justice of Delaware, a post he held until his death.

2. *Gunning Bedford.* A Princeton graduate, a lawyer and a large landowner, Bedford had been in the state legislature, a member of Congress, attorney-general of Delaware, and a delegate to the Annapolis convention. At Philadelphia he did not participate in the debates to any great extent.

Originally he was in favor of merely strengthening the Articles of Confederation. On June 30 "Mr. Bedford contended that there was no middle way between a perfect consolidation and a mere confederacy of the states. The first is out of the question, and in the latter they must continue if not perfectly, yet equally sovereign. We must like Solon make such a government as the people will approve. Will the smaller states ever agree to the proposed degradation of them? It is not true that the people will not agree to enlarge the powers of the present Congress. The language of the people has been that Congress ought to have the power of collecting an impost, and of coercing the states when it may be necessary. On the first point they have been explicit and, in a manner, unanimous in their declarations. And must they not agree to this and similar measures if they ever mean to discharge their engagements. The little states are willing to observe their engagements, but will meet the large ones on no ground but that of the Confederation. We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good government. It will be the last indeed if the propositions reported from the Committee go forth to the people. He was under no apprehensions. The large states dare not dissolve the confederation. If they do the small ones will find

146 1 Records 463.
147 1 Records 570.
148 2 Records 217.

some foreign ally of more honor and good faith, who will take them by the hand and do them justice. He did not mean by this to intimidate or alarm. It was a natural consequence which ought to be avoided by enlarging the federal powers, not annihilating the federal system. This is what the people expect. All agree in the necessity of a more efficient government, and why not make such an one as they desire."[149] For this reference to the possibility of the small states seeking foreign alliances, Bedford was rebuked by Rufus King, and he later apologized to the Convention.

In June he was opposed to the Congressional negative, stating "And after all, if a state does not obey the law of the new system, must not force be resorted to as the only ultimate remedy, in this as in any other system? It seems as if Pennsylvania and Virginia by the conduct of their deputies wished to provide a system in which they would have an enormous and monstrous influence. Besides, how can it be thought that the proposed negative can be exercised? Are the laws of the States to be suspended in the most urgent cases until they can be sent seven or eight hundred miles, and undergo the deliberations of a body who may be incapable of judging of them? Is the National Legislature too to sit continually in order to revise the laws of the states?"[150]

But in July, once the states were assured of equal representation in the Senate, the record shows that "Mr. Bedford moved that the second member of Resolution 6 be so altered as to read 'and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.' "[151] And he defended his proposal by stating that, "It is not more extensive or formidable than the clause as its stands; no State being separately competent to legislate for the general interest of the Union."[152] Bedford subsequently was appointed a United States district judge in 1789, and held the post until his death.

3. *John Dickinson.* A lawyer and a conservative Whig, Dickinson had argued in 1767-68 against Parliament's power to tax the colonies in his well-known "Letters of a Pennsylvania Farmer." A member of both the First and Second Continental Congresses, he had opposed the radicals and refused to sign the Declaration of Independence. His role in the drafting of the Articles of Confederation has been discussed previously. Moving to Delaware, he was again a delegate to Congress in 1779, and president of the state executive council in 1781.

Dickinson never lost his preference for monarchy over republican

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149 1 Records 490.
150 1 Records 167.
151 2 Records 26.
152 2 Records 27.

government, but he recognized the realities. Early in the Convention he stated that "A limited Monarchy he considered as one of the best governments in the world. It was not certain that the same blessings were derivable from any other form. It was certain that equal blessings had never yet been derived from any of the republican form. A limited monarchy however was out of the question. The spirit of the times—the state of our affairs, forbade the experiment, if it were desirable."[153]

Dickinson accepted the necessity, even the desirability, of continuing the state governments. On June 2 he said "He had no idea of abolishing the state governments as some gentlemen seemed inclined to do. The happiness of this country, in his opinion, required considerable power to be left in the hands of the states."[154] On June 6 "Mr. Dickinson considered it as essential that one branch of the Legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the legislatures of the states. This combination of the state governments with the National Government was as politic as it was unavoidable. He was for a strong National Government but for leaving the states a considerable agency in the system. The objection against making the former dependent on the latter might be obviated by giving to the Senate an authority permanent and irrevocable for three, five or seven years. Being thus independent they will speak and decide with becoming freedom."[155] On June 7 he stated that "The preservation of the states in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the states altogether would degrade the councils of our country, would be impracticable, would be ruinous. He compared the proposed National system to the solar system, in which the states were the planets, and ought to be left to move freely in their proper orbits . . . . If the state governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the National Government would move in the same direction as the state governments now do, and would run into all the same mischiefs. The reform would only unite the 13 small streams into one great current pursuing the same course without any opposition whatever."[156] King's notes for the same day record him as saying that "We cannot abolish the states and consolidate them into one Government—Indeed if we could I should be against it—Let our Government be like that of the solar system; let the General Government be the sun and the

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153] Records 86.
154] Records 85.
155] Records 136.
156] Records 152.

states the planets repelled yet attracted, and the whole moving regularly and harmoniously in their respective orbits—"[157]

When the representation dispute brought forth the New Jersey plan as a response to Virginia's proposals, "Mr. Dickinson said to Mr. Madison, you see the consequence of pushing things too far. Some of the members from the small states wish for two branches in the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large states."[158] But it is clear that Dickinson strongly believed in the necessity of national supremacy over the states. Speaking in behalf of the Congressional negative on June 8 "Mr. Dickinson deemed it impossible to drawn a line between the cases proper and improper for the exercise of the negative. We must take our choice of two things. We must either subject the states to the danger of being injured by the power of the National Government or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the power doubtful, would be opening another spring of discord, and he was for shutting as many of them as possible."[159]

And on August 14, he opposed compensation of Congressmen by the states. "Mr. Dickinson took it for granted that all were convinced of the necessity of making the General Government independent of the prejudices, passions, and improper views of the state legislatures. If the General Government should be left dependent on the state legislatures, it would be happy for us if we had never met in this room."[160] On the clause relating to suppression by the national government of domestic violence in the states, "Mr. Dickinson moved to strike out 'on the application of its legislature against.' He thought it of essential importance to the tranquillity of the U.S. that they should in all cases suppress domestic violence, which may proceed from the state legislature itself, or from disputes between the two branches where such exist."[161] And on the question of slavery, on which the defenders of state sovereignty seventy years later made their last stand, "Mr. Dickinson considered it as inadmissible on every principle of honor and safety that the importation of slaves should be authorized to the states by the Constitution. The true question was whether the national happiness would be promoted or impeded by the importation, and this question

1571 Records 159.
1581 Records 242.
1591 Records 167.
1602 Records 292.
1612 Records 466.

ought to be left to the National Government, not to the states particularly interested."[162]

After the Convention Dickinson urged ratification of the Constitution in his letters signed "Fabius" but his political career was over.

4. *Richard Bassett.* Born of a tavern-keeper, Bassett was later adopted by a lawyer, from whom he learned his profession and inherited a sizeable estate. He had been in the Delaware constitutional convention, both houses of the state legislature, and a delegate to the Annapolis convention. He did not participate in the debates at Philadelphia, but is recorded as voting against the Congressional negative. He signed the Constitution, and was a leading member of the ratification convention. A Federalist Senator from 1789 to 1793, he was chief justice of the court of common pleas from 1793 to 1799, and governor from 1799 to 1801. Bassett was one of the "midnight judges" appointed by Adams just before going out of office and whose commissions were withheld by Jefferson.

5. *Jacob Broom.* Son of a blacksmith, Broom became a prosperous business man of many interests—real estate, insurance, and cotton mills. At the Convention he seldom spoke, but favored a life term for the executive and the Congressional negative.

THE GEORGIA DELEGATES

1. *William Few.* In a convention dominated by men drawn from the upper classes, Few was unique in that he was a product of the small farmer class. His family had been involved in the Regulator movement in North Carolina. Burned out by the British, they went to Georgia, where they became ardent revolutionists. Few saw military service, became a lawyer, served in the state legislature, and was twice elected a delegate to Congress. At the Convention he did not enter into the debates, but he signed the Constitution and supported it in the Georgia ratification convention. He was a U. S. Senator from 1789 to 1793, and a federal judge from 1796 to 1799. Resigning, he went to New York where he eventually became a bank president.

2. *Abraham Baldwin.* Born in Connecticut, son of a blacksmith, Baldwin managed to graduate from Yale and become a licensed minister. He taught religion at Yale and was an army chaplain during the Revolution. Turning to the law, he went to Georgia, immediately got into politics, and served both in Congress and the legislature. Although he was probably the ablest of the Georgia delegates, Baldwin participated little in the debates at the Convention. He did speak out strongly in favor of the Senate being the representative of property owners.

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[162] 2 Records 372.

With the prospect in mind of Georgia becoming a populous state, Baldwin was originally in favor of proportional representation. His subsequent switch, probably influenced by the Connecticut delegation, helped make possible the adoption of the compromise. Baldwin said that he "would have wished that the powers of the general legislature had been defined, before the mode of constituting it had been agitated,"[163] and also that "It appears to be agreed that the government we should adopt ought to be energetic and formidable, yet I would guard against the danger of becoming too formidable."[164] He was against a provision prohibiting slavery, saying that he "had conceived national objects alone to be before the Convention, not such as like the present were of a local nature."[165] Baldwin served in the House from 1789 to 1799 and in the Senate from 1799 until his death in 1807. During this period he was a faithful Republican, opposing the Hamilton policies, voting against the Alien and Sedition laws, voting to repeal the Judiciary act of 1801, and voting to convict Justice Chase.

3. *William Pierce.* Little is known of Pierce's background and early life. After serving with distinction in the Revolution, he settled in Savannah, where he engaged in a general mercantile and banking business, and was a delegate to Congress in 1787. Pierce participated little in the debates, and is remembered chiefly for his lively and interesting character sketches of the other delegates. In two instances, however, he revealed that he was no believer in state sovereignty. On May 31 he said that "It appeared clear to me that unless we established a Government that should carry at least some of its principles into the mass of the people, we might as well depend upon the present confederation. If the influence of the states is not lost in some part of the new Government we never shall have any thing like a national institution. But in my opinion it will be right to show the sovereignty of the state in one branch of the Legislature, and that should be in the Senate."[166] And on June 29 he stated: "The great difficulty in Congress arose from the mode of voting. Members spoke on the floor as state advocates, and were biased by local advantages. What is Federal? No more than a compact between states; and the one heretofore formed is insufficient. We are now met to remedy its defects, and our difficulties are great, but not, I hope insurmountable. State distinctions must be sacrificed so far as the general government shall render it necessary—without, however, destroying them altogether. Although I am here as a representative from a small state, I consider myself as a citizen of the

[163] 1 Records 469.
[164] 1 Records 475.
[165] 2 Records 372.
[166] 1 Records 59.

United States, whose general interest I will always support."[167] Pierce left the Convention in August and was not present for the signing of the Constitution. He explained this by writing to a friend that "I was absent in New York on a piece of business so necessary that it became unavoidable. I approve of its principles, and would have signed it with all my heart, had I been present."[168]

4. *William Houstoun.* Son of a royal officer in the government of Georgia, Houstoun was educated and studied law in England. The known details of his life are meager. His role in the Convention was insignificant, and he left when it was about half over. Commenting on the proposal to guarantee the states a republician form of government, he said that he "was afraid of perpetuating the existing constitutions of the states. That of Georgia was a very bad one, and he hoped would be revised and amended."[169] The constitution he referred to was the one drawn up by the radicals in 1777, providing for a unicameral legislature and broad suffrage rights. Houstoun also opposed the equal representation of the states in the Senate.

THE NEW YORK DELEGATES

1. *John Lansing.* Descendant of an old Dutch family, Lansing was an Albany lawyer who had been in the legislature for six terms, and speaker for two years. He had been mayor of Albany, and a member of Congress in 1784-85. In the Convention Lansing was an outspoken opponent of the idea of forming a national government, not only because he considered it as being beyond the power of the Convention, but because he believed that it would destroy the sovereignty of the states.

On June 16 "Mr. Lansing called for the reading of the 1st resolution of each plan, which he considered as involving principles directly in contrast; that of Mr. Patterson, says he, sustains the sovereignty of the respective states, that of Mr. Randolph destroys it. The latter requires a negative on all the laws of the particular States; the former, only certain general powers for the general good. The plan of Mr. R. in short absorbs all power except what may be exercised in the little local matters of the states which are not objects worthy of the supreme cognizance."[170] Yate's notes for the same day record Lansing as comparing the Paterson plan with the one offered by Virginia: "This system is fairly contrasted with the one ready to be reported—the one federal, and the other national. In the first, the powers are exercised as flowing from the respective state governments—The second, deriving its authority

[167] 1 Records 474.
[168] 3 Records 100.
[169] 2 Records 48.
[170] 1 Records 249.

from the people of the respective states—which latter must ultimately destroy or annihilate the state governments."[171]

On June 20, addressing himself to the proposal for a Congressional negative, Lansing declared "It is proposed that the General Legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many acts sent up from the states as there are days in the year. Will the members of the General Legislature be competent judges? Will a gentleman from Georgia be a judge of the expediency of a law which is to operate in N. Hampshire? Such a negative would be more injurious than that of Great Britain heretofore was. It is said that the National Government must have the influence arising from the grant of offices and honors. In order to render such a Government effectual he believed such an influence to be necessary. But if the states will not agree to it, it is in vain, worse than in vain to make the proposition. If this influence is to be attained, the states must be entirely abolished. Will any one say this would ever be agreed to? He doubted whether any General Government equally beneficial to all can be attained. That now under consideration, he is sure, must be utterly unattainable. He had another objection. The system was too novel and complex. No man could foresee what its operation will be either with respect to the General Government or the state governments. One or other, it has been surmised, must absorb the whole."[172] Yates' notes of the same day record Lansing as follows: "I am clearly of opinion that I am not authorized to accede to a system which will annihilate the state governments, and the Virginia plan is declarative of such extinction. And I hold it as an undoubted truth, as long as state distinctions remain, let the national government be modified as you please, both branches of your legislature will be impressed with local and state attachments. This national government will, from their power, have great influence in the state governments; and the existence of the latter are only saved in appearance. And has it not been asserted that they expect their extinction?"[173]

Concluding that the Convention was acting beyond its powers to create a national government destructive of state sovereignty and that they were powerless to stop it, Lansing and his colleague Yates left the Convention on July 10 and did not return. Lansing opposed the Constitution in the New York convention. Subsequently he served as a judge from 1790 to 1814. On a visit to New York in 1829, he disappeared. No trace was ever found of him and the circumstances remain unknown.

2. *Robert Yates.* Another Albany lawyer, Yates had been a radical

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[171] 1 Records 257.
[172] 1 Records 337.
[173] 1 Records 345.

Whig, a member of the various New York provincial Congresses, and was appointed in 1777 a judge of the New York Supreme Court. He was a staunch supporter of Governor Clinton during the 1780's, which meant that he was very much anti-Federalist. In the Convention he voted, on May 30, against the motion to establish a national government. In his notes for June 9, he recorded his own ideas as follows: "Upon the whole, every sovereign state according to a confederation must have an equal vote, or there is an end to liberty. As long therefore as state distinctions are held up, this rule invariably apply; and if a consolidated national government must take place, then state distinctions must cease, or the states must be equalized."[174]

Upon leaving the Convention, Yates and Lansing set forth the reasons for their action in a report to Governor Clinton. They wrote: "It is with the sincerest concern we observe, that, in the prosecution of the important objects of our mission, we have been reduced to the disagreeable alternative, of either exceeding the powers delegated to us, and giving our assent to measures which we conceive destructive to the political happiness of the citizens of the United States, or opposing our opinions to that of a body of respectable men, to whom those citizens have given the most unequivocal proofs of confidence. Thus circumstanced, under these impressions, to have hesitated, would have been to be culpable. We therefore gave the principles of the constitution, which has received the sanction of a majority of the convention, our decided and unreserved dissent; but we must candidly confess that we should have been opposed to any system, however modified, which had in object the consolidation of the United States into one government."[175] Then, referring to the instructions which they had received on going to the Convention, they continued: "From these expressions, we were led to believe, that a system of consolidated government could not in the remotest degree, have been in the contemplation of the legislature of this state, for that so important a trust, as the adopting measures which tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation, could not have been confided by implication . . . . Reasoning in this manner we were of opinion, that the leading feature of every amendment, ought to be the preservation of the individual states, in their uncontrolled constitutional rights . . . ."[176] They then set forth various reasons why a general government was undesirable, and stated that "These reasons were, in our opinion, conclusive against any system of consolidated government: to that recommended by the convention, we sup-

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[174] 1 Records 183.
[175] 3 Records 244.
[176] 3 Records 245.

pose most of them very forcibly apply[177] . . . . We were not present at the completion of the new constitution, but before we left the convention, its principles were so well established, as to convince us, that no alteration was to be expected, to conform it to our ideas of expediency and safety. A persuasion, that our further attendance would be fruitless and unavailing, rendered us less solicitous to return."[178]

Yates opposed the ratification of the Constitution in the New York convention. Accepting the result, however, he ran for governor the next year as a Federalist candidate against Clinton, but was defeated. He became chief justice of the New York Supreme court in 1790, serving until 1798. In 1795 he reverted to his anti-Federalism and ran again for governor, this time against John Jay, and was again defeated.

3. *Alexander Hamilton.* Born in the West Indies, this authentic genius entered King's College in 1773 and the next year, at the age of seventeen, wrote brilliant and penetrating pamphlets on the relations between the colonies and England. In 1777, at the age of twenty, Hamilton became Washington's aide and secretary, rendering invaluable service until he resigned in 1781. The next year, after three months study, he was admitted to the New York bar and was immediately elected to Congress.

Hamilton was one of the first Americans to think along truly national lines, and even before the Articles had been ratified, he correctly diagnosed their fatal weakness and prescribed the necessary remedy. Writing to James Duane in 1780, Hamilton said that "The idea of an uncontrollable sovereignty in each state over its internal police will defeat the other powers given to Congress, and make our union feeble and precarious."[179] In order to remedy this weakness, Hamilton suggested "calling immediately a convention of all the states, with full authority to conclude finally upon a general confederation"[180] which would give Congress the necessary powers. Reference has already been made to Hamilton's drafting, at the Annapolis convention, of the call for the Philadelphia convention, and his role in placing the New York legislature on record in favor of the move. Actually, Hamilton's greatest contribution to the establishment of the Constitution came before and after the Convention rather than in the convention itself. There he was consistently outvoted by Yates and Lansing in determining the New York vote, and finally left, returning only after they had in turn departed. Hamilton remained thereafter to sign the Constitution on behalf of New York.

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[177] 3 Records 246.
[178] 3 Records 247.
[179] Quoted in Curtis, Constitutional History of the United States p. 237, f.n. 3. (1897).
[180] Supra note 179 at p. 238.

On June 18, after the Virginia and New Jersey plans had both been advanced, Hamilton made his principal speech of the Convention. "He was obliged therefore to declare himself unfriendly to both plans. He was particularly opposed to that from New Jersey, being fully convinced, that no amendment of the confederation, leaving the states in possession of their sovereignty, could possibly answer the purpose."[181] After referring to the sovereignty of the states and "the ambition of their demagogues," Hamilton continued: "How then are all these evils to be avoided? Only by such a complete sovereignty in the General Government as will turn all the strong principles and passions above mentioned on its side . . . . The general power, whatever be its form, if it preserves itself, must swallow up the state powers, otherwise it will be swallowed up by them. It is against all the principles of a good government to vest the requisite powers in such a body as Congress. Two sovereignties can not co-exist within the same limits. Giving powers to Congress must eventuate in a bad government or in no government. The plan of New Jersey therefore will not do. What then is to be done? Here he was embarrassed. The extent of the country to be governed discouraged him. The expense of a General Government was also formidable; unless there were such a diminution of expense on the side of the state governments as the case would admit. If they were extinguished, he was persuaded that great economy might be obtained by substituting a General Government. He did not mean however to shock the public opinion by proposing such a measure. On the other hand he saw no other necessity for declining it. They are not necessary for any of the great purposes of commerce, revenue, or agriculture. Subordinate authorities, he was aware, would be necessary. There must be distinct tribunals; corporations for local purposes. But *cui bono*, the vast and expensive apparatus now appertaining to the states. The only difficulty of a serious nature which occurred to him, was that of drawing representatives from the extremes to the center of the community."[182]

Hamilton then offered his own plan for a government with "supreme" legislative, executive and judicial branches. The legislature, in which the Senators were to hold office for life, was to have "power to pass all laws whatsoever" subject to the absolute veto of the executive who was also to hold office for life. In order to assure national supremacy, the plan provided that "All laws of the particular states contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the state of which

181 1 Records 283.
182 1 Records 286-87.

he is Governor or President."[183] Hamilton's notes for his speech that day, after setting forth the objections to the confederation, contain the following comments:

"IV There seem to be but three lines of conduct.

I. A league offensive and defensive, treaty of commerce, and apportionment of the public debt.

II. An amendment of the present confederation by adding such powers as the public mind seems nearest being matured to grant.

III. The forming a new government to pervade the whole with decisive powers, in short, with complete sovereignty."[184]

Lest there should be misunderstanding of his position, Hamilton arose the next day to state that "He had not been understood yesterday. By an abolition of the states, he meant that no boundary could be drawn between the National and state legislatures; that the former must therefore have indefinite authority. If it were limited at all, the rivalship of the states would gradually subvert it. Even as corporations the extent of some of them as Virginia, Massachusetts, etc. would be formidable. As states, he thought they ought to be abolished."[185]

On June 21 he opposed a motion that the manner of electing the lower house of Congress be left to the state legislatures. "Col. Hamilton considered the motion as intended manifestly to transfer the election from the people to the state legislatures, which would essentially vitiate the plan. It would increase that state influence which could not be too watchfully guarded against. All too must admit the possibility, in case the General Government should maintain itself, that the state governments might gradually dwindle into nothing. The system therefore should not be engrafted on what might possibly fail."[186] And on June 29 he opposed equal representation in Congress, stating that "But as states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter."[187] As quoted by Yates, Hamilton said that "The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an artificial being, called states?"[188]

183] Records 293.
184] Records 304.
185] Records 323.
186] Records 358.
187] Records 466.
188] Records 473.

During his absence from the convention, Hamilton wrote to Washington on July 3 that "The prevailing apprehension among thinking men is that the Convention, from a fear of shocking the popular opinion, will not go far enough."[189] After he returned to the Convention, on September 6 "Mr. Hamilton said that he had been restrained from entering into the discussions by his dislike of the scheme of government in general; but as he meant to support the plan to be recommended, as better than nothing, he wished in this place to offer a few remarks."[190]

Hamilton's contribution to the ratification of the Constitution by writing most of the Federalist Papers is well-known. Even more remarkable, however, was his role in the ratification fight in New York where he succeeded, in one of the most amazing individual performances which ever took place in any popular assembly, in persuading a hostile convention to approve the constitution. His subsequent career as Washington's Secretary of the Treasury, his financial measures, his advocacy of a broad construction of the powers of the central government to achieve the purposes of the Constitution, were all consistent with the philosophy of nationalism which he had espoused from the beginning.

[EDITOR"S NOTE: The final installment of this article will appear in the December, 1959, issue of the MISSISSIPPI LAW JOURNAL.]

1893 Records 53.
1902 Records 524.

TAXATION—UNINCORPORATED ASSOCIATIONS AND THE MEDICAL PROFESSION

*Elwood L. Edwards**

Much publicity has been given recently to a bill passed by the United States House of Representatives which provides favorable tax treatment, such as that enjoyed by corporations, to professional and self-employed individuals who contribute a portion of their income to retirement plans. Bills such as H.R. 10 (Self-Employed Individuals' Retirement Plan of 1959), have been presented to Congress many times over the last ten years. None of the bills previously presented have passed both Houses, and it seems unlikely, considering present governmental spending, that this latest bill will be enacted.

This article is dedicated to the proposition that it is possible for certain groups of physicians and other professional people, prohibited from incorporating by state statutes, to secure the benefits of such a bill under our existing tax law.

A group of physicians in Montana, previously operating as a partnership, entered into an agreement to conduct their medical practice as an Association. The Articles of Association of this group gave it many of the attributes of a corporation, and, subsequent to the execution of this Agreement, a pension plan was established for the employees—including the physicians who were formerly members of the partnership. The Association contended that it was taxable as a corporation under the provisions of the Internal Revenue Code, and, therefore, it had the right to establish a tax-exempt pension plan. This plan was tested in the case of *United States v. Kintner*,[1] and the physicians' contention was sustained.

The Internal Revenue Service, however, was unhappy with this decision and announced this fact to the remaining circuits in Revenue Ruling 56-23, C.B. 1956-1 598, which held that a group of physicians who adopt the form of an Association in order to obtain the benefits of corporate status for purposes of section 401 (a) of the Internal Revenue Code of 1954, (tax-exempt pension and profit sharing plans), is in substance a partnership for all purposes of the Internal Revenue Code. In spite of the fact that many groups of physicians in various sections of the United States attempted to qualify under such a plan subsequent to the *Kintner* decision, the Internal Revenue Service con-

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1216 F.2d 418 (9th Cir. 1954).

tinued to maintain its position until late in 1957. At the time Revenue Ruling 57-546 was issued which stated the position of the Service to be that even though an Association establishes a pension plan under section 401 (a) of the Internal Revenue Code of 1954, this fact is not determinative of whether such organization will be classified as a partnership or an association taxable as a corporation. The *usual tests* will be applied in determining whether a particular organization of physicians or other professional groups has more characteristics of a corporation than of a partnership.

The tests which must be met by an Association in order to be taxable as a corporation are described in the Internal Revenue Code, the Regulations, and the decided cases.

Section 7701 of the Internal Revenue Code of 1954 is entitled "Definitions," and the portion of that section dealing with corporations reads as follows:

> "(3) CORPORATION—The term 'corporation' includes associations, joint stock companies, and insurance companies."

The general provisions of section 7701 state that when used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the term corporation includes associations, joint stock companies and insurance companies.

There is no definition under this section of the term "association", but Regulation 111, section 29.3739-2, 26 Code of Federal Regulations, 1949 edition, reads as follows:

> "The term 'associations' is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise."

Under section 7701 of the 1954 Code, the term "partnership" is defined as follows:

> "The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on and which is not, within the meaning of this title, a trust, an estate or a corporation; . . ."

Regulation III, section 29.3997-4, 26 Code of Federal Regulations, 1949 edition, reads in part as follows:

> ". . . If an organization is not interrupted by death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation."

The Supreme Court of the United States has applied these tests in more than one instance and the cases cited below set out the characteristics which cause a group to be considered a corporation for Federal Income Tax purposes.

In the case of *Morrisey v. Commissioner*,[2] the Supreme Court of the United States held that an organization could be an association and taxable as a corporation for the years 1924 to 1926, when it was created for the development of a tract of land for the construction and operation of a golf course, club house, etc., and with broad powers for purchase, operation, and sale of properties. The court based its decision on the facts that the arrangement provided for centralized control, continuity and limited liability. The court also mentioned the fact that the analogy to corporate organization was carried still further by the provisions for issuance of transferable certificates.

In the case of *Helvering v. Combs*,[3] the Court held that the fact the beneficiaries did not hold a meeting, that the trust had no office or place of business, no seal, by-laws or official name, and the operations of the trustee were confined to the one lease they acquired, were not determinative factors. The court said that here, through the medium of a trust, the parties secured centralized managment of their enterprise, continuity during the trust term without elimination or interruption by death or changes in the ownership of the interest, limited liabilities, and transferable beneficial interest evidenced by certificates. The court opined that the beneficiaries had thus avoided the characteristic responsibilities of partners and secured advantages analogous to those which pertain to a corporate organization.

The case which first applied the foregoing tests to the problem of an association of physicians and a tax-exempt pension plan was the case of *United States v. Kintner*.[4] The court there applied the "usual tests" and concluded that the association of physicians involved in that case bore more resemblance to a corporation than to a partnership. Consequently, the court held that the association should be taxed as a

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[2] 296 U.S. 344 (1935).
[3] 296 U.S. 365 (1935).
[4] 216 F.2d 418 (9th Cir. 1954).

corporation and that the contributions to the pension trust established by the association were contributions to an exempt trust.

The principal points which the court in the *Kintner* case relied upon to distinguish a corporation from a partnership are:

(1) centralized control by a small number,
(2) continuity,
(3) limitation of liability.

The articles of association of the group involved in the *Kintner* case provided that the business be managed by an executive committee composed of five members elected by the entire group. These articles further provided that the association shall not terminate on the death or withdrawal of a member but shall continue until the death of the last survivor of the original members. They also provided that only the individual member was to be liable to third parties for his professional misconduct. The court comments on this provision in the following language:

> "Although the Articles of Association disclaim liability to others for the negligence or lack of skill of the doctors, the association which contracts with the patients and receives his fees would be responsible directly to the patient . . . ."

The court goes on to say that even though this attempt to limit liability is probably not effective, "It follows that the nonliability clause does not stand in the way of considering the association before us a corporation rather than a partnership for federal income tax purposes . . . ."

The United States Court of Appeals for the Sixth Circuit has decided cases which may be considered indicative of what its position will be if the question of a physicians' association is presented to it. In the companion cases of *Commissioner v. Fortney Oil Company* and *Commission v. Townline Oil Company*,[5] the question presented was whether taxpayers were associations within the meaning of section 1001 (a) (2) of the Revenue Act of 1936, and thereby subject to income tax as corporations.

> Section 1001 (a) (2), Revenue Act of 1936 reads in part as follows: "The term 'corporation' includes associations, joint-stock companies, and insurance companies."

Treasury Regulation 94, promulgated under the Revenue Act of 1936, Article 1001-2:

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[5] 125 F.2d 955 (6th Cir. 1942).

"The term 'association' is not used in the act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity . . . ."

In the first case the Fortney Oil Company, a Michigan corporation which held a lessee's interest in a certain oil and gas lease, assigned various fractional undivided shares amounting in all to about two-thirds of its interest in the leasehold to thirteen individuals under separate identical agreements. These agreements gave the company as "trustee" broad power, for the entire life of the lease, to manage and control the drilling and operation of oil and gas wells on the premises covered by the lease and to pay all expenses involved in such development and operation. Articles 5, 6 and 7 of this agreement are set out in part below:

"Fifth. It is understood, and as to his proportionate share, the assignee herein assumes the obligations and agreements herein contained, and the obligations and agreements of the assignees in the certain oil and gas lease covering the acreage herein described, but that nothing herein contained shall be construed as constituting the operations under this or any other part-assignment of said lease, a mining partnership, or other than a venture by tenants in common of said lease-hold estate.

Sixth. The Trustee shall have the right to expend the money contributed by the assignee under this assignment of the payment of said lease and drilling the well or wells.

Seventh. This agreement shall be binding upon the parties hereto and their successors and assigns . . . ."

The facts in the second case are very similar to those in the first case. A portion of the court's language reads:

"The agreements expressly provide that failure to pay a proportionate share of any assessment necessary for the continuation of development would result in reversion to the assignors of the assignee's interest in the undrilled portion of the property. Transfer of an assignee's interest to a successor or assign would not affect the continuity of the ventures. Unified control of the property in each case was thus completed and its continuity was assured. There can be no doubt that operations were conducted for profit and that

> the assignees were entitled to share in the gains of the enterprises. Under treasury regulation 94, article 1001-2, this clearly constitutes an association . . . ."

The Court also held, with regard to article five of the agreement, wherein the parties attempted to fix their status, that "the parties in each case endeavored by the contract to exclude any relationship of partnership and to fix the status of the operation as a venture by tenants in common of said lease-hold estate." This contract could not control the status nor or we bound in this instance by the decisions of state courts, for the act of Congress fixing the tests and establishing the definitions of the word "association" controls entirely as to questions of Federal Taxation.[6]

The court based its decision that this was an association and taxable as a corporation on two principal facts. There was continuity of life and centralized control.

It should be noted that section 1001 (a) (2) of the Revenue Act of 1936 has exactly the same wording as section 7701 of the 1954 Internal Revenue Act. It should also be noted that the section of the regulations defining association which was cited in the foregoing case, Treasury Regulation 94, Article 1001-2, reads exactly the same as Regulation III, Section 29.3739-2, 26 Code of Federal Regulations, 1949 edition.

In addition to the other corporate attributes which have been discussed, the Articles of Association of a medical association could provide for annual meetings of the holders of certificates of ownership; use of proxies; annual election of an executive committee; election of officers, president, vice-president and secretary-treasurer, to perform ordinary corporate duties of such officers; power to fix salaries in the executive committee; assets to be held in the name of the association and various other qualities that ordinarily are found in corporations. The association should employ the physicians, bill the patients, and withhold social security and withholding tax from all of its employees just as if it were a corporation.

Considering the cases, Code Section, and Regulations, which support the *Kintner* case, it seems inevitable that the Internal Revenue Service must adopt the holdings of this decision. No official comment has been made on this problem in more than a year, but the Internal Revenue Service has reported unofficially that the criteria for determining whether or not a group of physicians or other professional people meet the test, and are therefore able to establish a tax-exempt pension

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[6]Hecht v. Malley, 265 U.S. 144 (1924); Weiss v. Wuiner, 279 U.S. 333, 337 (1929).

plan, will be set forth in the regulations. So far these regulations have not been issued, but it has been indicated that the final determination as to the right of a group of physicians to establish such a plan would be dependent on three separate determinations.

First, the physicians must be operating as an association which is taxable as a corporation under federal income tax laws. The Articles of Association of the group must be carefully drawn so as to make it as closely akin to the corporate form of operation as possible under the state laws restricting the right of a corporation to practice medicine. The drafting of this agreement is a legal problem in which both the Federal tax laws and the laws of each state should be considered.

This first determination we understand will be made by the Corporate Ruling Section of the Internal Revenue Service. Once this hurdle is passed, two further steps will be necessary to obtain approval.

Very close scrutiny will be given by the Employment Tax Section as to whether an employer-employee relationship exists between the physicians and the association. This determination will likewise be based upon the right of the governing body of the assocation to hire and fire its physician participants, to designate their activities, control their compensation, and, in addition to this, whether the association will continue in uninterrupted existence in the event of the death, resignation or removal of one or more of the physician members.

In the event these two tests are met and both the Corporate Ruling Section and the Employment Tax Section have approved the association's operation, the examination of the association's pension or profit sharing plan will then be considered by the same standards and rules as any other small business corporation.

High taxes and high living costs make it almost impossible for professional and self-employed persons to save for retirement out of current income. Through the use of qualified pension and profit sharing trusts, it has been possible, for some time, for corporations to provide retirement benefits for their employees. There is no apparent reason for allowing this tax advantage to employees of a corporation and denying it to persons who are members of a partnership or otherwise self-employed. With the *Kintner* case as a guide, it is believed that substantial tax advantages can be secured by groups of physicians and other professional people by the use of the association form of doing business, regardless of the fate of H. R. 10 in the Senate.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXX | MAY, 1959 | NUMBER 3

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Student Comments

THE DOCTRINE OF CY PRES IN CHARITABLE TRUSTS— ITS NEED IN MISSISSIPPI*

". . . the cy pres power is no part of the judicial system of our government." So stated the Mississippi Supreme Court in *National Bank of Greece v. Savarika.*[1] It is the purpose of this article to analyze Mississippi's position in two respects: (1) its relationship to the present trend and authority in the United States; and, (2) its effect on the use of the charitable trust in Mississippi. In so doing, it will be necessary to consider the origin and history of the doctrines of cy pres, both in Europe and in the United States, and to consider the operation of the doctrine as applied to charitable trusts.

I. Origin

Cy pres is a derivation of the Norman-French expression "Cy pres comme possible" which means as near as possible or as near as may be.[2] As it is used in the administration of charitable trusts, the doctrine means that the Court, under proper circumstances, will apply the res of the trust as near as possible to the intenton of the settlor. Although the words "cy pres" are derived from the Norman-French, the doctrine does not look to the Law of France, nor to the Common Law of England for its origin. The use of the doctrine antedates Christianity, and early reported cases dealing with the doctrine can be found in the French, Spanish and Roman Law.[3]

> ". . . In the Pandects of Justinian we find cases to the same effect . . . Amongst others, in the Digest, lib. 33, tkt. 2, law 16, a case is reported which occurred in the early part of the third century. in which a legacy was offered to a city in order that from the yearly revenues games might be celebrated for the purpose of preserving the memory of the deceased. It was not lawful at that time to celebrate these games. The question was, what was to be done with this legacy; Modestinus, a celebrated jurist of authority, replied: 'Since the testator wished games to be celebrated which were not permitted, it would be unjust that the amount which he had destined to that end should go back to the heirs. Therefore let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner . . . ."[4]

It is seen that the doctrine is not peculiar to the English Common Law, but was first used in the Continental systems. However, it is not certain that the Continental systems were the birthplace of the English

*Recipient of the 1959 Deposit Guaranty Bank and Trust Company Award.
1167 Miss. 571, 148 So. 649 (1933).
2Bogert, Trusts and Trustees § 431 (1935).
3Late Corporation of Latter Day Saints v. United States, 136 U. S. 1, 53 (1889).
4See note 3 supra.

doctrine of cy pres. English authority[5] cites two possible origins for the doctrine as practiced in England. One is the previously mentioned use on the Continent, the other the peculiar practices of medieval England and their effect on the administration of trusts. During this period of English history, the influence of the Church was strongly felt. In many instances, a person made his Last Confession and his Last Testament at the same time, and it is known that a person, properly impressed by the presence of a priest and the gravity of the moment, made pious bequests in the hope that this charity might win favor for him in the Life hereafter. Also, during the medieval period, it was the Ordinary, i.e., the Bishop, who was charged with the administration of estates, and it is known that he favored the administraton and disposition of the pious bequests regardless of the obstacles.[6] The administration of the pious bequests in a manner different from that specified by the testator was justified on the ground that there was a general principle of piety in the bequest.[7] After the Reformation, the administration of Charities fell into the hands of the Chancellors who were heirs to a tradition firmly established by their ecclesiastical predecessors. It is believed that the doctrine of cy pres was resurrected by the Chancellors in an effort to uphold charitable bequests which were made in an attempt to purchase one's salvation,[8] the general theory being that a testator made the charitable bequest in order to gain a place in Heaven, and that it would be wrong for the Court to allow the bequest to fail for reasons unknown to the testator when such a failure would deny the testator his attempted expiation of sins, and would give the property to his heirs at law, contrary to his intention. "In what the doctrine originated, whether . . . in the principles of the Civil Law . . . or in the religious notions formerly entertained in this country, I know not . . . ."[9] Although the exact origin of the doctrine could not be determined, this did not prevent the doctrine from becoming an established part of the English Common Law.

In England, there are two branches of the cy pres doctrine: (1) the judicial; and, (2) the prerogative. Judicial cy pres is exercised by the Chancellor as a part of the inherent power of a court of equity. It existed independently of statute, and although there has been confusion on the point, it is generally recognized that the statute of 43 *Elizabeth c.* 4, dealing with charitable uses, is merely a confirmation of the cy pres power and is not the source of the power.[10] Judicial cy pres was always concerned with the general intention of the donor-testator, and cases in which the judicial power was invoked were decided in accordance with the general charitable intention of the donor-testator.[11]

Prerogative cy pres was a power belonging to the sovereign who

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5Moggridge v. Thackwell, 7 Ves. 36 (1802).

6Gray, The History and Development in England of The Cy-Pres Principle in Charities, 33 B. U. L. Rev. 30 (1950).

7See note 5 supra.

8Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375 (1953).

9See note 5 supra.

10Clayton v. Hallet, 30 Colo. 31, 70 Pac. 429, 434 (1902).

11Comment, 48 Harv. L. Rev. 1162 (1934-5) citing Zollman, Charities §§ 120-21 (1924).

acted as "parens patriae" of his people.[12] When a case, which involved the use of the prerogative power, arose, the Crown, at the suggestion of the Attorney-General, directed the disposal of the property under the Sign Manual, i.e., under the royal signature.[13] As the power was prerogative, no regard for the intention of the testator was necessary, and in most cases the choice of the final disposition was purely arbitrary.[14] The prerogative power was later delegated to the Chancellor,[15] as keeper of the King's conscience. As a result, the same judicial officer was charged with the exercise of a purely judicial duty, the judicial cy pres; and the exercise of a purely ministerial duty, the Sign Manual. Eventually, the exercise of these two separate powers by the same tribunal took its toll, and as the number of cases decided under the two cy pres powers increased, it became more and more difficult to distinguish between the two and it soon became virtually impossible to determine which power had been exercised in any given case. This very confusion of the two powers under the one title of "cy pres" was to have a very definite effect on the acceptance of the doctrine in the United States.

Although the two powers were exercised by the same Court, it is necessary to note the circumstances under which the cy pres powers were exercised, and equally as important, which particular power was being exercised. In England, the judical power was exercised in cases involving: (1) an absolute gift to a charitable organization;[16] and, (2) a charitable trust.[17] Under the second division, the following situations were handled: Immediate failure or impracticability of the testator's named object;[18] the subsequent failure of the testator's object;[19] immediate surplus where the testator's named object is unable to absorb the surplus;[20] and where there is a subsequent surplus arising from the diminution of objects or from an increase in the funds.[21] At one time there was a conflict as to whether a gift to a trustee with discretion to distribute it to charity in general was to be administered under the judicial or prerogative power. The conflict was resolved in favor of the judicial power.[22]

The prerogative power was exercised in the following situations:[23] (1) a gift for charity which does not involve a trust; (2) an absolute gift to a charitable society; and, (3) gifts for an illegal purpose, such as the promotion of a forbidden religion. It was the abusive exercise of the prerogative power, which ignored the intent of the donor-testator, that brought about the vast majority of criticism directed at the doctrine.[24] The most infamous example of the abusive exercise of the

12Bogert, Trusts and Trustees § 432 (1953).
13Bogert, op. cit. supra note 12.
14Comment, op. cit. supra note 11.
15Note, 13 Cornell L. Q. 310, 312 (1927-8).
16Bogert, Trusts and Trustees § 432 (1953).
17Bogert, op. cit. supra note 16.
18Biscoe v. Jackson, 35 Ch. D. 461 (1187).
19Re Slevin, 2 Ch. 236 (1891).
20Re Joyce, Ch. 514 (1940).
21Re Campden Charities, 13 Ch. 310 (1881).
22Moggridge v. Thackwell, 7 Ves. 36 (1802).
23Bogert, Trusts and Trustees § 432 (1953).
24Comment, 49 Yale L. J. 303 (1939-40).

Sign Manual is found in *Da Costa v. De Pas*,[25] which involved a gift for an illegal purpose. A Jewish testator left money in trust to apply the income for the establishment of a jesuba, an assembly for instruction in the *Jewish* religion. At the time of the bequest, the Jewish religion was forbidden as being contrary to the established religion. Therefore, the King, under the Sign Manual, directed the income from the trust fund to be applied to the support of a *Christian* preacher in a foundling hospital. Although the injustice of the decision was readily apparent, it was reluctantly followed in subsequent English cases.[26]

This was the cy pres doctrine when it came to America: a doctrine originally of two parts which had been erroneously merged into one due to the vesting of the two powers in one judicial officer. The confusion and abuse of the cy pres powers was the ground upon which the American Courts had to build.

II. Operation And Scope Of Cy Pres

It is a principle of Trust law that if for some reason a trust fails and there is no provision for a subsequent disposal, the res goes to the settlor or his heirs at law by way of resulting trust.[27] The use of cy pres is one means by which courts can prevent the failure of charitable trusts. In America, the doctrine of cy pres is a rule of construction in which the intention of the donor is controlling.[28] This is in accord with the English view of the judicial cy pres and is in direct opposition to the prerogative power. The *Restatement of Trusts*[29] describes the nature and operation of cy pres as follows:

> "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."

Cy pres requires the presence of a valid charitable gift for its operation.[30] That is to say, the doctrine of cy pres is peculiar to charitable trusts and charitable organizations. There are two requisite elements to the operation of cy pres: ". . . when the Court can see in the instrument a general charitable purpose as well as a specific gift, and when the specific gift fails . . . ."[31] The first to consider is the failure of the specific gift. It must be noted that although the specific gift may have failed, if the donor-testator has provided for disposition upon failure of the gift, then cy pres does not apply,[32] the doctrine being applicable

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[25] 1 Amb. 228, 2 Swarst. 487 (1754).
[26] Attorney-General v. Downing, Wilm. 1, 32, Amb. 549 (1767).
[27] Lusk v. Lewis, 32 Miss. 297 (1856).
[28] Note, 17 B.U.L. Rev. 763, 765 (1937).
[29] Restatement, Trusts § 399 (1935).
[30] Smith v. Ahern, 52 R. I. 346, 161 Atl. 117 (1932).
[31] Allen v. Nasson Inst., 197 Me. 120, 77 Atl. 638 (1910).
[32] Mississippi Children's Home Society v. City of Jackson, 93 So.2d 483 (Miss. 1957).

only when there is a failure with no provision for the subsequent disposal of the property.

The element which usually determines the applicability of cy pres to a particular situation is general charitable intent, the crucial question being—was the specific charitable object which failed merely a mode for carrying out the general intention of the testator or was it the only charity the testator intended to benefit?

> "If you see a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity, and you find that the particular mode the testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the charity from that particular mode, then the court says there is a general intention of charity . . . ."[33]

The origin of the requirement of a general charitable intention is the English case of *A-G v. Boultbee*,[34] in which it was held that if the intention could not be executed literally, then as far as is consistent with the general intention of the donor, cy pres could be applied and the mode of execution changed. The requirement of a general charitable intention has been criticized by an eminent authority[35] for the following reasons: (1) some courts believe that they are carrying out an actual secondary intent of the settlor;[36] and, (2) others decide their cases on the assumption that the settlor actually considered the subsequent disposal of the res if the object of the first trust failed.[37] However, this criticism is directed at an element of the doctrine and is not an attack upon the doctrine as a whole. It is suggested that courts should disregard the fictional test of charitable intent and base their decisions on public policy considerations.

Generally speaking, "to justify a court in applying cy pres . . . there must be a situation in which the application of the fund as intended by the donor is impossible, impractical, or inexpedient . . . ."[38] A limitless variety of situations may be found for the application of cy pres,[39] but attention is now directed to those situations which most frequently occur and are easily classified. First, consider a case where the trust fund was inadequate to perform the act specified by the testator. A testator, expressly disinheriting his heirs, gave land to his lodge for an orphan home site,[40] The remainder of the property was given to the lodge for the establishment of a sanitarium for the treatment of disease by methods prescribed by testator in his will. It was found that the funds of the trust were insufficient to carry out the projects of the testator. Upon finding a general charitable intent, the

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[33]State v. Federal Square Corporation, 89 N.H. 538, 3 A.2d 109 (1938) quoting from Biscoe v. Jackson, 35 Ch. Div. 460, 463 (1187).

[34]2 Ves. Jun. 379 (1794), *aff'd* 3 Ves. Jun. 220.

[35]Bogert, Trusts and Trustees § 436 (1953).

[36]Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82 (1924).

[37] Trustees of Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777 (1890).

[38]Bogert, Trusts and Trustees § 438 (1953).

[39]Bogert, Trusts and Trustees § 439 (1953).

[40]Mac Carroll v. Grand Lodge, 154 Ark. 376, 243 S. W. 870 (1922).

Court held that the property could be sold and the proceeds applied to the support of a home for widows and orphans which the lodge already maintained. A second situation involves an absolute gift to a charitable organization which cannot be identified. Testatrix directed a remainder interest to be paid to "the charitable institution for crippled children . . . more particularly designated as ....."[41] The Court awarded the remainder to a hospital with which the testatrix was familiar; that, in the Court's opinion, met all requirements of the testatrix. Third, consider an absolute gift to a chartiable organization which never existed or ceased to exist before the gift was made. Testatrix left several bequests to charitable organizations one of which was incorporated but dormant at date of execution of the will.[42] One year prior to testatrix's death, the corporation forfeited its charter. The Court found a general charitable intent and directed the gift to be applied cy pres, thereby preventing the lapse of the gift. Fourth, is a gift that contains an illegal element. Testator left a bequest to a charitable organization far in excess of the amount the organization was, by law, allowed to hold.[43] Upon finding that the particular charitable organization was an instrument for carrying out the general charitable intent of the testator, the Court stated that they would appoint a trustee to act in place of the corporation in the management of the excess amount. The fifth situation involves gifts where discretion is given to a trustee who cannot perform. Testatrix directed named executors to distribute the residue of her estate "to such charities that he or they may feel that I would be interested in."[44] Before the distribution was completed, all named executors had died. The Court held that the residue would be distributed under the Court's supervision.

III. American Attitude

A. *Statistically*

From the founding of this country to the time of the Civil War, the judicial attitude was one of hostility to cy pres and to charitable trusts in general. As of 1860, 15 states had considered the doctrine. Of these, Alabama, Connecticut, Georgia, Iowa, New York, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia repudiated the doctrine.[45] It was approved[46] in Indiana, Illinois, Kentucky, New Hampshire and Massachusetts. By 1860 Pennsylvania, having originally

[41]Note, 23 Temp. L. Q. 159 (1949-50).

[42]Rhode Island Hospital Trust Company v. Williams, 50 R. I. 385, 148 Atl. 189, 74 A.L.R. 664 (1929).

[43]Hubbard v. Worchester Art Museum, 194 Mass. 280, 80 N.E. 490 (1907).

[44]Levin v. Attorney-General, 136 N.J. Eq. 568, 42 A.2d 870 (1945).

[45]Carter v. Balfour's Administrator, 19 Ala. 814, 830 (1851); White v. Fisk, 22 Conn. 31, 54 (1852); Beall v. Drane, 25 Ga. 430, 442 (1858); Miller v. Cittenden, 2 Iowa 315, 369 (1856); Beckman v. Bonsor, 23 N.Y. 298, 310 (1861); Lemmond v. Peoples, 41 N.C. 107 (1848); Methodist Church v. Remington, 1 W. 219 (Pa. 1832); Attorney General v. Jolly, 26 S.C. 379 (1848); Green v. Allen, 24 Tenn. 162, 232 (1844); Gallego's Ex'trs. v. Attorney General, 3 Leigh 450, 473 (Va. 1832).

[46]Sweeny v. Sampson, 7 Ind. 465, 477 (1854); Gilman v. Hamilton, 16 Ill. 225, 231 (1854); Curling's Administrators v. Curling's Heirs, 38 Ky. 38 (1839); Second Congregational Society v. First Congregational Society, 14 N.H. 315, 330 (1843); American Academy of Arts and Sciences v. President of Harvard College, 78 Mass. 582 (1832).

repudiated the doctrine, enacted the first American statute approving the doctrine.[47]

After 1860 Delaware[48] and the District of Columbia[49] disapproved the doctrine, while Kentucky reversed its stand and disapproved the doctrine.[50] Alabama, Connecticut, Delaware and Indiana have reversed their original stand and have approved the doctrine,[51] while Kentucky has allowed its use in certain instances.[52] Alabama, Georgia, New York and Virginia have changed from disapproval to approval by way of statutory enactments.[53] Louisiana, Maryland, Minnesota, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin, California and Texas have also enacted statutes approving and regulating the use of the doctrine.[54] Indiana, Maine and Massachusetts have statutes regulating the use of cy pres in certain instances.[55] As of the present, Arizona, by way of dictum, and North Carolina, South Carolina, Tennessee, the District of Columbia and Mississippi refuse to recognize the doctrine as part of their jurisprudence.[56]

B. *Reasons For Opposition*

A survey of the cases shows that opposition to cy pres falls into one of four well-defined categories. First are those cases which confuse the relationship between the statute of 43 *Elizabeth* c. 4 and the cy pres power. American Courts were confused as to whether equity's power over charitable trusts stemmed from the Common Law or from the statute of Elizabeth. The United States Supreme Court held that power over charitable trusts came from the statute,[57] but in a later

[47]Pa. Pub. Law 328 § 10 (1855).

[48]Doughten v. Vandever, 5 Del. Ch. 51 (1875).

[49]Graff v. Wallace, 59 App. D.C. 64, 32 F.2d 960 (D. C. Cir. 1929), *cert. denied*, 280 U.S. 579 (1929).

[50]State Bank & Trust Co. v. Patridge, 198 Ky. 403, 248 S.W. 1056 (1923).

[51]Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So.2d 817 (1950); Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699 (1919); Union Methodist Episcopal Church v. Equitable Trust Co., 32 D. Ch. 197, 83 A.2d 111 (1951); Richards v. Wilson, 185 Ind. 335, 112 N.E. 780 (1916).

[52]When testator's methods are impractical or impossible and not when object of trust fails or ceases to exist. Citizens Fidelity Bank & Trust Co. v. Bernheim Foundation, 305 Ky. 802, 205 S.W.2d 1003 (1947).

[53]Ala. Code tit. 47, § 145 (1940); Ga. Code Ann. §§ 108-202, 113-815 (1948); N. Y. Personal Property Law § 12 (2); N.Y. Real Property Law § 113 (2) (1941); Va. Code § 55-31 (1950).

[54]La. Laws c. 592 (1954); Md. Code Ann. art. 16, § 295 (1957); Minn. Stats. Ann. § 501.12 (1945); R. I. Gen. Laws c. 487, § 1 (1938); S. Dak. Laws c. 429, p. 505 (1955); Vt. Stats. §1282 (1947); W. Va. Code § 3502 (1955); Wisc. Stats. §§ 231.11 (7), 323.025 (1957); Cal. Probate Code § 101 (1954); Vernon's Tex. Civ. Stats. Ann. art. 2595 (1925).

[55]Ind. Stats. Ann. §§ 26-631 (1948) - (general donations); Me. Rev. Stats. c. 57, §§ 33-34 (1954)-(pious purposes); Mass. Laws Ann. c. 214, § 3 (11)-(municipalities); Mass. Laws Ann. c. 214, § 3 (12) (1932)-(religious societies).

[56]Hawyard's Estate, 65 Ariz. 228, 178 P.2d 547 (1947) (dictum); Woodcock v. Wachovia Bank & Trust Co., 214 N.C. 828, 199 S.E. 20 (1938); Mars v. Gibert, 93 S.C. 455, 77 S.E. 131 (1913); Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946); Graff v. Wallace, 59 App. D.C. 64, 32 F.2d 960 (D.C. Cir. 1929), *cert. denied*, 280 U.S. 579 (1929); National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933).

[57]Trustees of Philadelphia Baptist Associations v. Hart's Executors, 17 U.S. 1 (1819).

decision[58] changed their opinion and held that the equitable power over charitable trusts stemmed from the Common Law. The correct view seems to be that equity's power over charitable trusts came from immemorial usage prior to the enactment of the statute of Elizabeth.[59] However, this early confusion continued to exist to some degree and many states continued to hold that the statute of Elizabeth, which was not in effect in their states, was the source of equity's jurisdiction over charitable trusts and the auxiliary doctrine of cy pres.[60]

A second group of cases confused the judicial power with the prerogative power. Due to the previously mentioned practice of allowing the English Chancellor to exercise both powers, the line of demarcation between the two became blurred by a line of confusing cases. It was recognized at an early stage in our history that the prerogative power did not exist in the United States.[61] Although a few enlightened courts recognized that ". . . the power, apart from the prerogative power, is a regular chancery power . . . ,"[62] many courts, relying on English cases which had blurred the line of separation between the two, held that "the cy pres rule was an English rule, and formerly resorted to as an exercise of the prerogative power . . . ."[63]

A third group of cases rejected cy pres as being a rule of arbitrary disposition giving Chancellors power to remake deeds and wills according to their own social or religious views.[64] These cases also failed to see the distinction between the judicial and prerogative powers, that is, that it was the prerogative power, not the judicial power, which was guilty of arbitrary disposition without regard to the settlor's intentions. These Courts were greatly influenced by the abusive use of the prerogative power in cases such as *De Costa v. De Pas*.[65] It is believed that the criticism of the Courts was directed to the religious persecution practiced in England rather than to the cy pres power.[66]

A fourth group of cases base their rejection of the doctrine on the belief that the power is unsuited to our democratic institutions.[67] Undoubtedly these decisions were influenced by the philosophies of Montesquieu, Locke and Blackstone. The cy pres power was thought not only to be in conflict with our theory of separation of powers, but it was believed to be undemocratic in that it violated the natural right of man, particularly his right of property.[68] These cases favored the "dead hand" of the donor-testator to the exclusion of the public welfare. It is to this group of cases that Mississippi pledges its allegiance. The general attitude of this group is found in the expression:

58Gerard v. Gerard, 43 U.S. 127 (1844).
59Clayton v. Hallett, 30 Colo. 31, 70 Pac. 429 (1902).
60Scott, Trusts § 348.3 (2d ed. 1956).
61Perin v. Carey, 24 U.S. 465 (1861).
62Pell v. Mercer, 14 R.I. 412, 436 (1844).
63Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82 (1924).
64Bogert, Trusts and Trustees § 433 (1953).
651 Amb. 228, 2 Swarst. 487 (1754).
66Comment, 49 Yale L. J. 303 (1939-40).
67Grimes Ex'trs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690 (1871); National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933).
68Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375 (1953).

> "No public benefit, no increased beneficence, no advantage to religious activity, can justify a court in making over the wills . . . of men, in the conviction that changed conditions make this, if not necessary, at least highly desirable."[69]

In recent years, the trend has been toward the acceptance of cy pres either by case decision or statutory enactment. One cause is the re-examination of the source and nature of the doctrine. Many courts in their zeal to denounce the prerogative power had also erroneously denounced the judicial power. Upon re-examination, these courts found that the cy pres power, as correctly understood, encompassed two powers and that it was the prerogative power that was foreign to the democratic society of America. These courts were quick to admit that it was the prerogative power and not the judicial power that had been repudiated in their jurisdictions.[70]

The possible major cause for the trend is the change in legal philosophy in the United States. Pre-1900 thinking emphasized the position of the individual, but the advent of the twentieth century found a definite change in the public attitude. Due largely to the legal philosophy of Pound[71] in which he denounced exaggerated respect for the rights of the individual and preached the good of the society, many courts began considering the public as the ultimate beneficiary of a charitable trust. In so doing, the courts found that the cy pres doctrine was in keeping with the modern legal philosophy expounded by Pound.

> ". . . these rich men should be remembered with honor who devote some part of their estate to widen opportunity and enjoyment for the public. In death, as in life, those who have accumulated large estates should have regard 'for the spears of Judah and the archers of Benjamin'—that solid mass of men who have lived in poverty or struggled through life on small means, yet whose law-abiding spirit has protected the property of those who have made large accumulations of wealth, in safety and untroubled by the spoiler."[72]

The emphasis on the good of the society has not yet become the prevailing theory for there still exists the conflict between the "dead hand" theory, on the one side, whereby the words of the will or the trust instrument are solemn mandates for the guidance of the court; and, on the other side, the consideration of the public welfare, "the importance of the welfare of the beneficiaries which may not be advanced by the donor's provisions, the fact that in time machinery set up by the donor is outgrown."[73] That the present trend is away from the "dead hand" doctrine is shown in the fact that ". . . the courts of today, believing that the public good is served by a liberal enforcement

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[69]First Congregational Society v. City of Bridgeport, 99 Conn. 22, 37, 121 Atl. 77 (1923).

[70]Tumlin v. Troy Bank & Trust Co., 258 Ala. 238, 61 So.2d 817 (1950); Delaware Trust Company v. Graham, 30 D. Ch. 330, 61 A.2d 110 (1948).

[71]Pound, Spirit of the Common Law, 18 The Green Bag 17 (1906).

[72]Wachovia Bank & Trust Co. v. Ogburn, 181 N.C. 331, 107 S. E. 238 (1921).

[73]Bradway, Tendencies in the Application of the Cy-Pres Doctrine, 5 Temp. L. Q. 489 (1930-31).

of the purpose of the donor, apply the cy pres doctrine whenever possible and support charitable trusts to the limits of the doctrine."[74]

IV. Conclusion

In *National Bank of Greece v. Savarika*,[75] a testator devised money to a bank in Athens, Greece, in trust—the interest thereon to be paid to the trustee of a school for girls at Bougasticon, Macedonia, Greece. There was no school for girls at Bougasticon, and the territory including it had been ceded by Greece to Turkey. The Mississippi Court held that since no beneficiary described in the trust instrument was in existence, the trust failed. The Court refused to uphold the trust because ". . . It would have to be applied through the vague, voluntary, and arbitrary mode of cy pres, or the act of Elizabeth . . . ."[76] In this case, and in a later case,[77] the Court recognized a distinction between the doctrine of cy pres and the equitable doctrine of approximation. The distinction between approximation, which allows deviations from the terms of the trust, and cy pres, which allows the substitution of objects of charity as long as the substituted object is within the scope of the general charitable intent of the testator, is, at best, hazy and indefinite. This is evidenced by the fact that some courts hold that cy pres in the United States is the equitable doctrine of approximation,[78] while others use the approximation theory to reach the results that would be reached by a use of cy pres.[79]

The immediate problems in Mississippi are: (1) to determine whether this state adheres to the equitable doctrine of approximation; and, (2) if the doctrine of approximation is followed in Mississippi, a good workable distinction between cy pres and approximation should be drawn. It is indicated by the cases that equitable approximation is recognized in Mississippi, but as yet, the Court has not taken an affirmative stand on this question. Assuming that the approximation doctrine is in force in Mississippi, it is submitted that no principle by which one can determine the outer limits of approximation and the beginning of cy pres has been stated by the Court. Even if such a guiding principle were formulated, it is believed that, at best, this would be but a temporary solution to the problem.

The use of the charitable trust is ever increasing in our modern society and the tendency in the field of charitable trusts is toward increasing control by the courts.[80] It is submitted that cy pres is a necessary ingredient to the success of the charitable trust, and a continuing refusal to recognize this doctrine will eventually lead to the destruction of the charitable trust in Mississippi. This result can be prevented by a repudiation of Mississippi's present stand on the doctrine. Two avenues are available—court action or legislative action.

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[74]Fisch, supra note 68 at 388.

[75]167 Miss. 571, 148 So. 649 (1933).

[76]Ibid. at 655.

[77]Mississippi Children's Home Society v. City of Jackson, 93 So.2d 483 (Miss. 1957).

[78]Doyle v. Whalen, 87 Me. 414, 32 Atl. 1022 (1895).

[79]Note, 39 Colum. L. Rev. 1358 (1939). See also Annot., 169 A.L.R. 266, 268 (1947).

[80]Bradway, supra note 73 at 489.

If legislative action is considered, insight can be gained from a study of the statutes enacted in other jurisdictions.[81] The following statute, enacted in Maryland and Vermont,[82] is submitted as containing a general statement of the doctrine as it is understood in the United States.

> "If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment, or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to a charity, (a court of equity) may, on application of any trustee, or any interested party or the attorney general of the state, order an administration of the trust, devise or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator."[83]

If Court action is taken, the historical background of the doctrine should be ignored as much as possible for the old cases are couched in confusing and antiquated terminology. A workable doctrine should be based upon a re-evaluation of the conflicting philosophies of law, and there should be a compromise struck between the interests of the individual and the interests of society.

Harold D. Miller, Jr.

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[81]See notes 53, 54 and 55 supra.

[82]Md. Code Ann. art. 16, § 295 (1957); Vt. Stats. § 1282 (1947).

[83]The Model Act concerning the administration of Charitable Trusts, Devises and Bequests, recommended by The National Conference of Commissioners on Uniform State Laws (1940) cited in Scott, Trusts § 399 (2d ed. 1956).

WORKMEN'S COMPENSATION-APPORTIONMENT OF SUCCESSIVE INJURIES--MISSISSIPPI'S NEW APPORTIONMENT ACT

I. Introduction

On January 1, 1959, an important modification to the Workmen's Compensation Law of Mississippi took effect,[1] i.e., the Apportionment Act passed in 1958. The purpose of this comment is twofold: first, to show broadly how the legislatures and judicial bodies of the other States have dealt with the problem of working out an equitable result between the employer and his employee who had a previous impairment which was aggravated by the subsequent industrial accident, and, second, to illustrate the effectiveness of the apportionment law in Mississippi in the future.

II. General Explanation

A. *Historical Significance*

The purpose of the Workmen's Compensation Act was to aid the working man, who, hampered by economic forces and harsh common law rules, had a slim chance of recovery from the majority of industrial accidents.[2] In turn, society has been relieved somewhat of the burden of caring for such unfortunate employees and their dependents. In short, the ideal situation would be where the Workmen's Compensation Act provided an equitable result for all concerned.

However, such was not the result. Many states followed the Massachusetts rule[3] whereby the last employer had to pay for the end result regardless of the nature of the injured employee's disability prior to his industrial injury. The courts which followed this unfair rule echoed these familiar words: "The employer takes the employee with all his existing disabilities and weaknesses and such employee is entitled to compensation for injury arising out of his employment irrespective of the fact such injury is more severe by reason of his pre-existing condition or defect."[4] Thus, a rule such as this meant that employers would be reluctant to hire handicapped workers and would be strongly motivated in releasing those handicapped workers already employed. As Larson[5] points out, thirty days following the non-apportionment rule in *Nease v. Huges Stone Co.*,[6] between seven and eight thousand handicapped workers were displaced in Oklahoma.

There were states,[7] which on the other hand, while adhering to the Massachusetts rule, modified it so that it became difficult for the

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[1]House Bill 610, which amends Sec. 4 of M.W.C.A.

[2]Dunn, Mississippi Workmen's Compensation, § 2 (1957). For a full explanation see Horowitz, Injury and Death Under Workmen's Compensation Laws, pp. 1-10 (1944).

[3]Blanco's Case, 308 Mass. 574, 33 N.E.2d 313 (1941); See Walsh v. Kotler, 46 N. J. Super. 425, 134 A.2d 458 (1958), the N. J. court rejected the deputy director's attempt to apportion claimant's pre-existing condition and held the employer for the total amount; Martin v. Snuffy's Steak House, 46 N. J. Super 425, 134 A.2d 789 (1957); Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W.2d 617 (1955).

[4]Martin v. Snuffy's Steak House, supra note 3.

[5]2 Larson, The Law of Workmen's Compensation, § 59.32 (1952).

[6]114 Okla. 170, 244 Pac. 778 (1926).

[7]1 Larson, The Law of Workmen's Compensation, § 38.64 (1952).

employee to recover at all. Their answer was the unusual exertion doctrine. This rule required that such employees suffering from a pre-existing condition must, at the time of the industrial accident, have caused greater exertion than that ordinarily incident to employment.[8] In Oklahoma, before the employee with a pre-existing condition can be compensated, he must show that the second injury was not a mere recurrence of the first, but that the second accident was due to an independent and intervening cause. Thus, in *Hall v. Howard Johnson of Oklahoma*,[9] it was held that a second injury of the employee's back was a mere recurrence of the previous injury, and compensation was denied.

B. *Present Trends*

Today, the Massachusetts rule and the unusual exertion rule are the minority rules, for the majority of the states have passed some type of apportionment law. Perhaps the most popular of these has been the *second injury fund statutes*.[10] Under these statutes a special fund is created for the sole purpose of paying that part of the second injury which was increased due to the prior defect. The employer pays the other portion. Since it is difficult to generalize as to how these statutes work, the best approach seems to be to discuss the two following cases which illustrate this point.

In *Hamilton Engineering Co. v. Industrial Commission*,[11] prior to the industrial accident the claimant had received X-ray treatments for neural dermatatis. These treatments caused his vision to grow continuously worse until he had to wear glasses. Finally, he had a cataract removed from his left eye. His right eye was damaged during the accident. The Illinois Court held that it was error for the lower court not to deduct the previous loss of the left eye, and also held, concerning the right eye, that the employer should pay for the part attributed to the last injury and the State Treasurer should pay the balance out of the special fund.

In *Fronzen v. Blakely*[12] the plaintiff had fractured her right wrist in an automobile accident. In 1948 she fell and broke her left wrist while working as a waitress. She sought compensation for *both* hands. The Nebraska Supreme Court held that plaintiff had a permanent disability as a result of the accident and was entitled to compensation. The employer was liable for the second injury, and the second injury fund was to compensate for the additional disability caused by the pre-existing condition.

Next, there are the states which have apportionment statutes.[13] While these statutes differ in many respects, they are alike in one cen-

[8]Gattula v. Standard Reliance Ins. Co., 165 Neb. 1, 84 N.W.2d 179 (1957); Rosso v. Aetna Steel Products Corp., 174 Pa. Super. 258, 101 A.2d 392 (1953); Schroeder v. Arthur Sales Co., 5 N. J. Super. 287, 68 A.2d 878 (App. Div. 1949); see also 15 U. Pitt. L. Rev. 655 (1954).

[9]297 P.2d 560 (Okla. 1956).

[10]See 44 Mich L. Rev. 162 (1949).

[11]339 Ill. 30, 76 N.E.2d 506 (1947).

[12]155 Neb. 621, 52 N.W.2d 833 (1952).

[13]States which have apportionment laws are California, Florida, Indiana, Kentucky, Maryland and North Dakota.

tral theme. The last employer pays only that portion of the injury not attributed to the employee's pre-existing condition. No one pays for the prior defect unless it was a prior compensable injury.[14] The rule in New Hampshire is to apportion successive compensable injuries between successive employers.[15] Each employer pays his respective share for the second injury. Thus, the responsibility of the first employer continues as to future disabilities.

The apportionment rule is not perfect, chiefly for two reasons. Unlike the second injury fund statutes, the employee is not compensated for that amount due to the aggravation of his pre-existing condition. Thus, handicapped workers will receive less compensation in apportionment states than in second injury fund states. Another imperfection is shown in an example where a worker loses part of his leg while working for a high wage and then later loses the rest of that leg while working for a lower wage, which he was receiving as a result of his prior defect. It is readily seen that under the apportionment rule, if the compensation is based on the wage at the time of each injury, then the worker will receive less for both injures than he would if his leg had been completely severed in one accident. The worker has lost even more when his additional pain and suffering are considered.[16]

Of course, this last imperfection may work to the employee's advantage as it did in *Fuytinck v. Burton W. Duenke Building Co.*[17] In that case the claimant had two successive back injuries. There had been a compromise settlement for the prior injury, and the wages received at the time of the second injury were higher. The Missouri court held that use of the higher wage for the wage basis was proper since the wage of the claimant at the time of the second injury is the proper basis for figuring the claimant's compensation for that injury.

The mechanics of the apportionment rule are relatively simple, as illustrated by the case of *Dunn v. Hartford Accident & Indemnity Co.*[18] In this case the claimant, prior to the second injury, had lost only 4.3 per cent of his vision. His percentage loss after the second injury was 96.7 per cent of his eyesight. The Georgia court held that the Board of Workmen's Compensation should first determine the total disability found to exist after the last injury, determine the disability found after the earlier injury, and subtract the latter from the former. Therefore, the claimant got 92.4 per cent attributable to his last injury.

It appears that the difficult part is determining what portion of the injury is caused by the pre-existing defect. In *City of Glendale v. Industrial Accident Commission,*[19] Justice Fox aptly stated:

> "The difficulty of making an apportionment does not relieve the Commission of the duty imposed on it by statute. Making an apportionment is no more speculative or difficult than determining

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146 S.C.L.Q. 481 (1954).

15Dunbar Fuel Co. v. Cassidy, 100 N. H. 397, 128 A.2d 904 (1957); Minnesota allows apportionment between insurers. See 40 Minn. L. Rev. 93 (1955).

16Hopper v. Firestone Stores, 222 S. C. 143, 72 S.E. 71 (1952); 6 S.C.L.Q. 480 (1954).

17280 S.W.2d 449 (Mo. 1955).

1881 Ga. App. 283, 58 S.E.2d 245 (1950).

19153 Cal. App. 213, 314 P.2d 182 (1957).

the extent and duration of a physical injury and awarding compensation therefor. 'It is a thing that courts and juries do every day in personal injury actions . . . . The Commission and its referees should be deemed no less competent to perform this task than is the ordinary jury . . . .' To require the employer to assume the entire financial burden of the applicant's disability simply because it is difficult to make an apportionment between the occupational and non-occupational causes would not only be contrary to the mandate of the Legislature but also unfair and inequitable to the employer."

III. The Situation in Mississippi

In Mississippi on the eve of the date the Apportionment Act was to take effect, the case of *L. B. Priester & Son v. McGee*[20] was handed down. This decision illustrates the striking need for such a law and the harshness of the previous rule. In this case the employee had sustained a heart attack in 1952 and had received compensation. He carried with him a severe arterios-clerotic disease when he was employed in 1956. He was not asked nor did he tell his employer of this pre-existing condition. In the fifth week of his employment, he suffered a severe coronary occulsion with infraction. The Supreme Court of Mississippi held that the injury was compensable and the last employer was responsible.

In *East v. Pigford Bros. Co.*,[21] the claimant had been operated on for hemorrhoids when eight years old and had been bothered again with hemorrhoids while a soldier in the second World War. In 1951 while cranking a gasoline motor, his hemorrhoid protruded with great pain, thus resulting in his disability. He had told his superintendent of this condition from which he had suffered while in the army. The Mississippi Supreme Court stated that:

"The strain in cranking the motor evidently lighted up, aggravated and accelerated East's pre-existing but dormant hemorrhoids, and combined with such infirmity to produce the disability for which compensation is here sought."

Then quoting Larson the Court stated:

"Pre-existing disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought."

From the *McGee* and *East* cases it is seen that prior to the Apportionment Act, Mississippi had adopted the Massachusetts rule with none of its modifications.[22] In Mississippi where there is added virtually

[20]106 So.2d 394 (Miss. 1958).

[21]219 Miss. 121, 68 So.2d 294 (1953).

[22]Other Mississippi cases are the following: pre-existing heart disease, Lewis v. Trackside Gasoline Station & Pac. Ind. Co., 103 So.2d 868 (Miss. 1958); pre-existing hypertension, Insurance Department of Mississippi v. Dinsmore, 102 So.2d 691 (Miss. 1958); weakness from prior operation, King v. Westinghouse Corp., 92 So.2d 209 (Miss. 1957); gall bladder trouble, chronic bronchitis, and a chronic heart disease,

unlimited medical aid, an employer who has employed a worker with a prior defect would find himself taking a substantial risk financially.[23]

From the Apportionment Act[24] the broad coverage of "a pre-existing physical handicap, disease or lesion" is limited to apportionment only if the employer had required a pre-employment physical examination and that examinaton disclosed a pre-existing permanent physical impairment. Indiana has a statute similar in that it also requires the injury to be a prior permanent one which is aggravated or increased by subsequent injury before there is apportionment. In looking to the purpose of such an amendment, the Indiana court, in *Kinzie v. General Tire and Rubber Co.*,[25] stated:

> "It seems obvious that the purpose of the amendment was to remove one of the major barriers against the employment of the physically handicapped persons by dealing more fairly with the employer of such persons. From common sense we know that afflicted members of the body are generally not only less productive than members which are whole, but that such afflicted members are also more susceptible to subsequent injury."

Mississippi adds to the rule requiring the previous impairment to be permanent, by requiring the employer to have discovered this defect through a pre-employment physical examination. In this requirement Mississippi stands alone. The only state which has a similar requirement is New York,[26] a "special disability fund" state. There the employer must have knowledge of the employee's pre-existing condition before he can recover for compensation payments paid after a period of 104 weeks of disability. Thus, in comparison, both Mississippi and New York require that, before there can be apportionment, the employer must have known of the employee's handicap. Mississippi's requirement differs in that the employer's knowledge of such defect can only be attained through a pre-employment physical examination.

Schilling v. Miss. State Forestry Commission, 226 Miss. 858, 85 So.2d 562 (1956); hypertensive cardiovascular disease, W. G. Avery Body Co. v. Hall, 224 Miss. 51, 79 So.2d 453 (1955); high blood pressure, Cowart v. Pearl River Tung Co., 218 Miss. 340, 67 So.2d 356 (1953); pre-existing mal-formation of blood vessels, Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So.2d 645 (1952).

[23]"The employer is required to furnish medical services, supplies and care . . . . There is no limit beyond what is reasonably required, either in dollar amount or duration of time . . . ." Dunn, Workmen's Compensation, § 27 (1957).

[24]House Bill 610 reads as follows: "Compensation shall be payable for disability or death of an employee from injury arising out of and in the course of employment, without regard to fault as to the cause of the injury, subject to the following:

"Where a pre-existing physical handicap, disease or lesion is aggravated, accelerated or adversely affected by accidental injury, or is in any manner a material contributing factor in the results following accidental injury, the compensation which, but for this paragraph, would be payable shall be reduced by that proportion which such pre-existing physical handicap, disease or lesion contributed to the production of the results following the accidental injury. Provided, however, this section shall only apply in those cases wherein the employer, in advance of any subsequent injury, has required a pre-employment physical examination, and such examination has disclosed a pre-existing permanent physical impairment, based on satisfactory medical evidence of such impairment, and such pre-existing physical handicap disclosed was materially aggravated by the subsequent injury."

[25]235 Ind. 592, 134 N.E.2d 212 (1956).

[26]Zyea v. A. D. Julliard & Co., Inc., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951).

As already stated, the coverage by the Act of a "pre-existing handicap, disease or lesion" is broad. California and Maryland also have broad coverages. California's law differs since it provides that in cases dealing with occupational diseases, the employee may, at his option, obtain an award from any of the successive employers. The selected employer can then obtain apportionment from the other employers.[27] The Maryland Court recently held, in *Bethlehem Steel Co. v. Munday*,[28] that it was error to restrict apportionment to a pre-existing disease or infirmity which had actually disabled to the extent of causing loss of work prior to the accident. Kentucky, one of the original states to adopt an apportionment law, amended its statute in 1948 so as not to include prior diseases except those resulting from a compensable injury. Mississippi, it would appear, will probably follow the result in the *Munday* case and leave no restriction as to what type of cases "disease" will apply.

It is submitted that under this broad coverage of the Act, even age of the employee might be a basis of apportionment. Senility caused by age is a permanent defect. In Arizona where age is specifically listed as a condition to be considered in apportioning the disability, the Supreme Court held in *Eagle Indemnity Co. v. Hadley*[29] that age must have amounted to a pre-existing disability in order for there to be any apportionment.

As for a disease which has lain dormant and would not have manifested itself but for the type work the employee performed, it is questionable whether or not it will be apportioned. The answer in Mississippi appears to depend on whether the employer was given knowledge of this defect when the pre-employment physical examination was given. Both California and Kentucky refuse to apportion such latent conditions. As the Kentucky Court, in *Wood-Mosaic Co. v. Shumate*,[30] colorfully explained:

> ". . . an employee might be compensated for disease disability, provided such disease had continuously lain in a completely harmless and inert condition, like some sleeping dog that might never awaken, until along came the vicious kick of a traumatic injury and aroused it into an active disability."

IV. Conclusion

In conclusion, before the enactment of apportionment statutes or second injury fund laws, the handicapped worker with a pre-existing condition either had little chance for recovery in states where the unusual exertion doctrine was followed, or found employment made more difficult in those states which adhered to the harsh Massachusetts rule. The employer, who happened to have had such a handicapped person working for him, might find himself paying for the industrial injury and any aggravation caused by the prior defect. These inequitable results have been, for the most part, cured by enactment of apportion-

[27]Bowler v. Industrial Accident Comm., 135 Cal. App. 534, 287 P.2d 562 (1955).
[28]212 Md. 214, 129 A.2d 162 (1957).
[29]70 Ariz. 179, 218 P.2d 488 (1950).
[30]305 Ky. 368, 204 S.W.2d 331 (1947).

ment laws. Mississippi's new apportionment law, while restricted to cases in which the prior defect was discovered by a pre-employment physical examination, should ease the inequities found in the past. Whether or not this law will produce a harmonious balance between the handicapped worker, the employer and society is doubtful. Much could depend upon future judicial interpretation of this Act.

Thomas D. Berry, Jr.

RECENT DECISIONS

Constitutional Law — Right To Reject Counsel As Element Of Due Process

Defendant was convicted of simple assault and assault with a dangerous weapon. The District of Columbia criminal court entered judgment and defendant appealed. The District of Columbia Court of Appeals (en banc) affirmed conviction. Held:[1] Affirmed. District of Columbia criminal court did not commit reversible error when it directed court-appointed counsel to proceed with trial after counsel's disclosure that defendant had stated desire for new lawyer because appointed counsel had expressed opinion that he could not get an acquittal. *Brown v. United States,* 27 U.S.L. Week 2385 (D.C. Cir. Feb. 2, 1959).

The right of a defendant in a criminal case to have the assistance of counsel for his defense is constitutionally guaranteed in Federal courts by the sixth amendment.[2] In contrast, the right of a defendant to defend himself in a criminal case in a Federal court is statutory.[3] It is from this statutory right to defend one's self that the correlative right to reject counsel logically should derive. The Federal courts of appeal have, in effect, consistently subordinated the statutory right to the constitutional right by invalidating those waivers of counsel considered by the courts of appeal to have been made unintelligently, incompetently, or involuntarily. Among the factors considered in invalidating those waivers have been the age of the defendant,[4] the seriousness of the offense,[5] the ignorance of the defendant,[6] the insanity of the defendant,[7] and the use of coercion in obtaining the waiver.[8] The action of the Federal courts in invalidating some waivers while validating others apparently results from the "fair trial" doctrine expounded in *Betts v. Brady*.[9] The essence of this doctrine is merely that the trial must be "fair," but the criteria to be applied in determining "fairness" are not set forth. The Supreme Court's refusal to establish any fixed criteria has resulted in uncertainty as to the discretion which the trial court has in accepting or rejecting a defendant's waiver of counsel when he wishes to defend

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[1]Decision was 5-4 with J. J. Washington, Edgerton, Bazelon and Fahy dissenting.

[2]U. S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[3]28 U.S.C. § 1654 (1952). "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[4]Moore v. Michigan, 355 U.S. 155 (1957).

[5]Chandler v. Fretag, 348 U.S. 3 (1954); Snell v. U.S., 174 F. 2d 580 (10th Cir. 1949).

[6]Moore v. Michigan, supra note 4; U.S. v. Nickerson, 124 F. Supp. 35 (D.C. Mass. 1954).

[7]Massey v. Moore, 348 U.S. 105 (1954).

[8]Moore v. Michigan, supra note 4; Widmer v. Johnston, 136 F.2d 416 (9th Cir. 1943).

[9]Betts v. Brady, 316 U.S. 455 (1942).

himself. In comparison, the situation in the state courts is basically the same. The criteria to be applied by the trial courts in accepting or rejecting waivers of counsel in state criminal proceedings are, if anything, even more vague. However, the manner in which this situation arose in the state courts has had a history which distinguishes it somewhat from the situation in the Federal courts. Although the right to counsel in criminal cases in Federal courts had long been recognized as guaranteed by the sixth amendment, it was not until the *Powell*[10] decision was handed down that this same right was extended to defendants in state criminal proceedings. The United States Supreme Court relied on the due process clause of the Fourteenth Amendment[11] in making its decision, and even then the Court did not go so far as to say that such a right extended to cases other than capital offenses. As a result of this decision, however, every state has made either constitutional or statutory provision for counsel in capital cases,[12] and all but five[13] have made similar provisions for less serious criminal offenses. The great majority of states at the same time provided that the defendant might waive counsel, either expressly or impliedly, and defend himself.[14] The general effect of the *Powell* case can safely be said to have been restrictive upon procedure in state criminal courts. Then came the *Betts* case, and its "fair trial" doctrine caused the situation previously described as existing in the Federal courts to arise in the state courts as well.

The specific law applicable to the instant case is limited by the relatively recent interest in this particular situation. The first criminal case in the Federal courts concerning the law applicable to the instant case did not arise until 1943, one year after the *Betts* case was decided. This case was *U.S. v. Mitchell,*[15] and the sequence of the *Betts* and *Mitchell* cases seems highly significant since the Federal circuit court, in reviewing Mitchell's conviction in the trial court, applied the "fair trial" doctrine of the *Betts* case and held that under the circumstances of the case it was within the trial court's discretion to accept or reject the defendant's waiver of counsel. Had the question arisen before the *Betts* decision was handed down, it is likely that the reviewing court in the *Mitchell* case would have held the trial court's action a denial of procedural due process. The precedent thus established was apparently approved by the Supreme Court inasmuch as certiorari was denied on the question.[16] This precedent has since been followed in every Federal case in point.[17]

Probably the most significant thing about the instant case lies in the split between the court, as such a split is also characteristic of the

[10]Powell v. Alabama, 287 U.S. 45 (1932).

[11]U.S. Const. amend. XIV, § 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[12]Equal Justice for the Accused, a report on the provision of counsel for indigent defendants by a Special Committee of The Association of the Bar of the City of New York and The National Legal Aid Association, appendix (1959).

[13]Alabama, Massachusetts, Mississippi, Pennsylvania, South Carolina.

[14]See note 13 supra.

[15]U.S. v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[16]U.S. v. Mitchell, 321 U.S. 794 (1943).

[17]U.S. v. Gutterman, 147 F.2d 540 (2d Cir. 1945); Swope v. McDonald, 173 F.2d 852 (9th Cir. 1949).

Supreme Court in such an area.[18] While the majority of one favors the *Betts* approach, the strong minority just as strongly favors a strict due process approach. This writer believes the instant case is the latest instance of the dilemma confronting the trial courts as a result of the *Betts* decision. So far the Supreme Court has given its tacit approval to what would seem the better horn of the dilemma. In view of the tendency of the Supreme Court to rely alternately upon the strict procedural due process approach and the *Betts* approach, it will be most interesting to note the outcome of an appeal to the Supreme Court if such an appeal is made.

E. Roy Hunt

CONSTITUTIONAL LAW — SEARCH AND SEIZURE INCIDENT TO A LAWFUL ARREST

Two deputy sheriffs, armed with a bench warrant, went to the house of the defendant to arrest him, his wife and a boarder for selling alcoholic beverages in a local option territory. Upon finding only the wife, the officers arrested her and thoroughly searched the house, finding a quantity of gin and beer in a closet, in the refrigerator and under the stove. Defendant was convicted and appealed on the ground that the evidence was procured in an unlawful manner. HELD: Reversed. Following the dissent in *Harris v. United States*[1] and *United States v. Rabinowitz*,[2] the Court held that the authority to search a person upon a lawful arrest does not extend to the entire house and that evidence so gained is inadmissable. The meaning of section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution are essentially the same. *Benge v. Commonwealth of Kentucky*, 27 U.S.L. Week 2422 (Ky. March 3, 1959).

To a large degree courts are in agreement as to the authority of officers to search parties arrested without the aid of a search warrant. It is agreed that they may search the person of the arrestee.[3] Although few decisions have limited the authority to search at this point, the degree beyond which the arresting officer may go without exceeding his power varies not only according to the jurisdiction, but varies from case to case within each jurisdiction. Various rules have been established. Federal courts and the Kentucky Court have held that arresting officers may search the person and that area under his "immediate

[18]Crooker v. State of Cal. 357 U.S. 433 (1958). Mr. Justice Douglas, joined in dissent by Chief Justice Warren and J. J. Black and Brennan, said: "The demands of our civilization expressed in the Due Process require that the accused who wants a counsel should have one at any time after arrest."

[1]331 U.S. 145 (1946).

[2]339 U.S. 56 (1950).

[3]Weeks v. United States, 232 U.S. 383 (1914); United States v. Mills, 185 Fed. 318 (S.D. N.Y. 1911), *writ of error dismissed* 220 U.S. 549 (1911); Agnello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927); Billings v. Commonwealth, 223 Ky. 381, 3 S.W.2d 770 (1928); Commonwealth v. Phillips, 224 Ky. 117, 5 S.W.2d 887 (1928); Morris v. Commonwealth 231 Ky. 838, 22 S.W.2d 295 (1929).

control."[4] *Harris v. United States* pointed out that the extent to which a search can be made depends upon the nature of the item sought in connection with the arrest. There it was decided that when one is arrested upon a charge of mail fraud involving certain checks, the search may be much more detailed than if the search incident to the arrest was for an automobile.[5] Other cases have distinguished between searching in a public business and in a private dwelling.[6] It has also been held that "fruits of the crime" for which the arrest is made and "tools of the crime" may be seized, but mere evidence cannot.[7] While the principal case did not consider these points specifically, the dissents which the decision in the instant case follows are very outspoken.[8] In the *Harris* case Justice Frankfurter, dissenting, went to great lengths to show that the purpose of the Fourth Amendment was to protect citizens from general exploratory searches. He maintained that searches such as that made in the *Harris* case[9] make it possible to frustrate the constitutional provision[10] by simply making an arrest before beginning the unauthorized search. Mr. Justice Jackson filed a separate dissent saying that he believed the authority to search following an arrest extended no further than the person and a very limited area under his "immediate control." This area certainly does not extend to the entire house. The Kentucky Court, in the principal case, said that this question was novel before that Court, but relied upon federal precedents since their constitutional provision was essentially the same as the Fourth Amendment.[11] Within the area of federal cases involving search upon arrest, there are two distinct lines, both seeming to have a great

[4]Boyd v. United States, 116 U.S. 616 (1886); Agnello v. United States, supra note 3; Carrol v. United States, 267 U.S. 132 (1925); Billings v. Commonwealth, supra note 3; Johnson v. Commonwealth, 216 Ky. 175, 287 S.W. 572 (1926).

[5]Harris v. United States, supra note 1 at 152.

[6]United States v. Rabinowitz, 339 U.S. 56 (1950).

[7]Marron v. United States, 275 U.S. 192 (1927); Brady v. United States, 300 Fed. 540 (6th Cir. 1924), *cert. denied* 266 U.S. 620 (1924).

[8]In Harris v. United States, 331 U.S. 145 (1946), Justice Frankfurter attached an extensive chart to his dissent tracing the history of the opinions handed down from the U.S. Supreme Court on the question from 1914 up to the date of the Harris opinion. It is his conclusion that the Court has in its handling all but stripped the Fourth Amendment of its meaning. Mr. Justice Jackson dissenting in the *Harris* case says that case and those leading up to it create an escape from the purview of the Fourth Amendment by allowing practically unlimited exploratory searches without a warrant under the guise of a search incident to a lawful arrest. In the Rabinowitz case, supra note 2, Justice Frankfurter repeats his view along with Justice Black, both writing dissenting opinions.

[9]In the Harris case, supra note 8, federal agents arrested the defendant in his living room armed with a warrant for his arrest but having no search warrant. Then they searched the entire four room apartment for five hours seeking two canceled checks. Instead they found, in a sealed envelope, several draft cards. These were used to obtain a conviction for violation of the Selective Training & Service Act of 1940.

[10]Ky. Const., § 10 reads as follows: "Security from search and seizure; conditions of issuance of warrant. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, not without probable cause supported by oath or affirmation."

[11]Benge v. Commonwealth, 27 U.S.L. Week 2422 (Ky. March 3, 1959); Youman v. Commonwealth 189 Ky. 152, 224 S.W. 860 (1920).

deal of prestige. Following one of these decisions,[12] the Kentucky court could easily have decided that the premises were properly searched. Instead they chose to follow the other line which is epitomized in the *Harris* and *Rabinowitz* dissents. Although the Fourth Amendment to the United States Constitution does not prohibit the admissibility of evidence gained by unlawful search and seizure, both the Federal Courts[13] and the Kentucky Court[14] have adopted the rule that such evidence is inadmissible in their respective jurisdictions.

It is believed that the Court, in the noted case, adopted the sounder of the two available lines of authority. As Mr. Justice Frankfurter has pointed out, the guarantee of freedom from unreasonable search and seizure is more often invoked by so-called undesirable citizens than other Constitutional guarantees such as freedom of speech and religion. Hence, this fundamental right has more often been neglected. However, once the authority to search goes to the extent of "ransacking his house" as it was described in the noted case, it would appear that the constitutional guarantee requires no more than a formal arrest. Obviously, even with the strictest limitations there will and should always be an area of judgment. It will always be necessary for the courts to determine what is meant by the "person" and the area under his "immediate control." But this task of construction must be met within the limits of stare decisis. The courts have been too erratic to provide such a guide. The problem now is to give both courts and executive officers a method of discerning with some degree of accuracy the limits of the arresting authority. If the *Harris* and *Rabinowitz* dissents and the noted case should become prevailing law, it would seem to give greater protection to the constitutional guarantees while costing little more than an occasional inconvenience for police officers. This loss will be more than compensated by the availability of a guide for the arresting officer.

J. E. Pool

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[12]Cases which hold that there is a broad authority to search the premises following a lawful arrest are: Agnello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927); Davis v. United States, 328 U.S. 582 (1946); Harris v. United States, 331 U.S. 145 (1946); United States v. Rabinowitz, 339 U.S. 56 (1950).

[13]Wolf v. People of Colorado, 338 U.S. 25 (1948), held that the guarantee of the Fourth Amendment does not effect the admissability of matter gained by unlawful search and seizure as evidence in a criminal case. However the federal courts held that matter so gained is inadmissable. Weeks v. United States, 232 U.S. 383 (1914); Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920); Gould v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1921).

[14]Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); Potowick v. Commonwealth, 198 Ky. 843, 250 S.W. 102 (1923); Clark v. Commonwealth, 204 Ky. 740, 265 S.W. 280 (1924).

CONSTITUTIONAL LAW — STATE TAXATION OF INTERSTATE COMMERCE

Appellant was an Iowa corporation whose activities in Minnesota consisted of the regular and systematic solicitation of orders from a list of eligible dealers. Forty-eight per cent of Appellant's total sales were made to such dealers in Minnesota. Under Minn. Stat. § 290.03 (1945),[1] which imposed an annual tax on the taxable net income of domestic and foreign corporations whose business within the state consisted exclusively of interstate commerce, Minnesota brought action against Appellant to collect income taxes for the years 1933 through 1948. Appellant resisted the tax as contrary to the commerce clause. Appellant's activities[2] within Minnesota were found to be an integral part of its interstate activities, and all revenue by it from customers in Minnesota resulted from its operations in interstate commerce. HELD: Affirmed. The net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is apportioned[3] to local activities within the taxing state forming sufficient nexus to support the same. *Northwestern States Portland Cement Co. v. Minnesota,* 79 S. Ct. 357 (1959).

It has been long established that a state tax upon a corporation doing only an interstate business may be invalid because levied (1) upon the privilege of doing interstate business within the state, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.[4] A state cannot levy a

[1]An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.

[2]Appellant maintained a small sales office in Minneapolis where it employed two salesmen and a secretary. It also employed three other salesmen elsewhere in Minnesota who worked out of their homes. Apart from the small amount of furniture in the Minneapolis office and two automobiles used by the salesmen, Appellant owned no property within the state, maintained no bank account there and warehoused no merchandise in Minnesota. All salaries and expenses were paid directly from the Iowa office. The salesmen were not authorized to accept orders, collect payments, or adjust claims. Orders were acknowledged directly to the purchaser and were filled by delivery to a rail carrier and consigned to the purchaser.

[3]Appellant's tax liability was determined by the use of the three factor formula prescribed by Minn. Stat. § 290.19 (1945). The following application defines and illustrates the use of the three factors:

(1)	Ratio of taxpayer's sales assignable to Minnesota to its total sales for the year wherever made	48.449%
(2)	Ratio of taxpayer's total tangible property in Minnesota to its total tangible property used in the business that year wherever situated	.1142%
(3)	Ratio of taxpayer's total payroll in Minnesota to its total payroll for the entire business	1.6484%
	Total	50.2119%
	Arithmetical Average	16.7373%

The final average of 16.7373 per cent represents the percentage of Appellant's income allocable to Minnesota for the 1948 fiscal year.

[4]Memphis Gas Co. v. Stone, 335 U.S. 80 (1948); Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U.S. 403 (1936); Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U.S. 160 (1903); Leloup v. Port of Mobile, 127 U.S. 640 (1888); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of engaging in such commerce.[5] A privilege tax,[6] a franchise tax,[7] or an excise tax[8] cannot be imposed on a foreign corporation. Such taxes, levied by a state on a domestic corporation, may be measured by the net income attributable to business done within the state,[9] but the constitutional infirmity of a tax on the privilege of carrying on exclusively interstate business persists no matter how fairly it is apportioned to business within the state.[10] The amount is unimportant when there is no legitimate basis for the tax.[11] A thorough search by the states for legitimate bases have uncovered several: "local business"[12] will support a franchise tax apportioned to business done within the state; "local activity"[13] is a legitimate basis for a non-discriminatory privilege tax; and "local events,"[14] apart from the flow of interstate commerce, provide taxable incidents. It was against this background that Mr. Justice Whittaker observed, "Inasmuch as it has always been thought by American lawyers that the states cannot tax interstate commerce but may tax intrastate commerce, it has been deemed necessary for the state to determine what portion of the total income of the taxpayer was derived from intrastate commerce done within its borders and is therefore subject to its taxing powers."[15]

Does the instant case really hold otherwise? It is submitted that it does not. The Court has merely abandoned the use of tags, such as "taxable events," and has adopted a pragmatic approach of determining whether the taxing powers exerted by the state bears any fiscal relation to protection, opportunities, and benefits given by the state, and whether the state has given anything for which it can ask a return.[16] The Court has said simply that a state may tax interstate commerce *if* there be a sufficient nexus between the tax and the transaction taxed. Only local activities can furnish a nexus, and thus, the question now becomes, not what local activities constitute intrastate commerce, but what local activities form a sufficient nexus.[17] The decision, therefore, opens no new source of revenue to the states; it only allows them to call the old source by its proper name.

Alfred E. Moreton

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[5]Ozark Pipe Line v. Monier, 266 U.S. 555 (1925).

[6]Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895).

[7]Ozark Pipe Line v. Monier, supra note 5.

[8]Alpha Portland Cement Co. v. Massachuesetts, 268 U.S. 203 (1925); Cheney Brothers Co. v. Massachusetts, 246 U.S. 147 (1918).

[9]Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441 (1936).

[10]Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).

[11]Alpha Portland Cement Co. v. Massachusetts, supra note 8.

[12]International Shoe Co. v. Shartel, 279 U.S. 429 (1929).

[13]Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949), upheld Miss. Code Ann. §§ 10105 and 10109 (1942).

[14]Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948).

[15]Northwestern States Portland Cement Co. v. Minnesota, 79 S.Ct. 357, 375 (1959) (dissenting opinion).

[16]Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940).

[17]Mr. Justice Whittaker points out that Appellant's activities might very well constitute intrastate commerce. Northwestern States Portland Cement. Co. v. Minnesota, supra note 15 at 371 (dissenting opinion).

CRIMINAL LAW — MISCEGENATION — INCEST

Defendant, a negro woman, was convicted by the trial court of cohabitating with a white man in violation of Section 2000, Code of 1942.[1] The Statute provides that cohabitation between a white person and a negro, whose marriage is prohibited by law by reason of race or blood, "and which marriage is declared to be incestuous and void," shall be a felony. HELD: Reversed. Cohabitation between a white person and a negro is not punishable under Section 2000 since incest is made an element of the crime and cohabitation between persons of different races is "miscegenetic" and not "incestuous." *Ratcliff v. State,* 107 So.2d 738 (Miss. 1958).[2]

Section 457, Code of 1942, prohibits marriage between persons within certain degrees of consanguinity. Section 458 prohibits marriage between persons within certain degrees of affinity. These marriages are declared to be "incestuous and void." Section 459, Code of 1942,[3] prohibits the marriage of a white person and a negro. This marriage is declared to be "unlawful and void." In amending Section 2000 of the Code, by Chapter 241, Laws of 1956, which added the words, "or persons whose marriage is prohibited by law by reason or (of) race or blood and which marriage is declared to be incestuous and void," the Legislature obviously attempted to prescribe the same punishment for miscegenetic cohabitation, adultry or fornication as was already prescribed for incestuous cohabitation, adultry or fornication. Undoubtedly the words "incestuous and void" were inadvertently added. Clearly this was a penalty relating to miscegenation. The court chose to follow the general rule of strict construction for penal statutes, which requires that an act come within the letter, as well as the spirit, of the act prohibited. Although the weight of authority would probably agree with this result,[4] authority exists to the effect that a penal statute should

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[1]"Persons being within the degrees within which marriages are declared by law to be incestuous and void, or persons whose marriage is prohibited by law by reason or (of) race or blood and which marriage is declared to be incestuous and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years."

[2]A companion case, Rose v. State, 107 So.2d 730 (Miss. 1958), in which the defendant was a white woman, was decided on the same day. A like question was presented and the same conclusion was reached by the Court.

[3]"The marriage of a white person and a negro or mulatto or person who shall have one-eighth or more of negro blood, or with a Mongolian or a person who shall have one-eighth or more of Mongolian blood, shall be unlawful, and such marriage shall be unlawful and void; and any party thereto, on conviction, shall be punished as for marriage within the degrees prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them."

[4]In State v. Traylor, 100 Miss. 544, 56 So. 521 (1911), the court said: "We know of no rule of law which will justify the court in convicting a person of any crime, unless the offense comes under the letter of the statute . . . criminal statutes must be strictly construed." In City of Cincinnati v. Levine, 81 Ohio App. 181, 75 N.E.2d 177 (1947) the court said: "A statute defining a crime . . . cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute." Also in accord with this view are: McInnis v. State, 97 Miss. 280, 52 So. 634 (1910); Lever Bros v. Erbe, 87 N. W.2d 469 (Iowa 1958); and United States v. One Electronic Pointmaker, 149 F. Supp. 417 (D.C. Ind. 1957).

be interpreted according to the obvious intent of the legislative body which passed the statute.[5] Apparently the courts have been even more careful not to extend statutes beyond their "letter" in incest cases than in other criminal areas.[6] Since it obviously was the intent of the Legislature to encompass miscegenetic relations within Section 2000 of the Code, and Section 459 does include such relations, it would be well to examine the miscegenation statutes found in the laws of other states, and the constitutionality of such acts. There are twenty-three states, in addition to Mississippi, which have laws in effect at the present time that prohibit marriage between white persons and negroes.[7] Most of the statutes declare that such marriages are void, rather than voidable. Only seven of these twenty-four states fail to provide punishment for such marriages.[8] Although miscegenation statutes have been consistently attacked as unconstitutional, with one exception,[9] the courts have de-

[5]The Mississippi Supreme Court in Bobo v. Board of Levee Comm'rs., 92 Miss. 792, 46 So. 819 (1908), stated: "While it is true that penal statutes should be strictly construed, it is undoubtedly the duty of the courts to look to the mischief intended to be prevented, and to take into consideration the character of the remedy proposed to be applied, in doing which the mere letter must yield to the manifest spirit." In Rainwater v. United States, 355 U.S. 534 (1958), the United States Supreme Court said: ". . . even penal provisions must be given their fair meaning in accord with the evident intent of Congress." These cases also follow the view of interpreting according to obvious intent: McDonald v. State, 32 Ala. 606, 28 So.2d 805 (1947); State v. Broussard, 213 La. 338, 34 So.2d 883 (1948); and State v. Rucker, 46 N. J. Super. 162, 134 A.2d 409 (1957).

[6]Chancellor v. State, 47 Miss. 278 (1872) decided that Section 2487 of the Revised Code of 1871 did not provide punishment for a man cohabitating with his step-daughter. Section 1763 of the Revised Code of 1871, prohibited marriage between a man and his wife's daughter. Section 2487, supra, provided punishment for cohabitation between persons "within the degrees of consanguinity, within which marriages are by law declared to be incestuous." The court held that since the statute employed the word "consanguinity" and did not use the word "affinity" the defendant was not guilty of any crime thereunder. In State v. Lee, 196 Miss. 311, 17 So.2d 277 (1944), the court held that although the statute in force at that time prohibited intercourse between a father and his daughter or step-daughter, the statute did not apply to intercourse between a father and his legally adopted daughter. This has since been changed by statute. The case of State v. Winslow, 208 Miss. 753, 45 So.2d 574 (1950) interpreted Section 458 and 2234 of the Code of 1942 as not providing punishment for marriage between a man and his mother-in-law. Section 458, supra, prohibits marriage between a father and his daughter-in-law, and says, "the like prohibition shall extend to females in the same degree." This last clause would seem to indicate that a mother-in-law is not to marry her son-in-law. However, the court refused to accept this view; declared that the statute was ambiguous and turned the defendant loose. The following cases placed similar restrictions on incest statutes: State v. Youst, 74 Ohio App. 381, 59 N.E.2d 167 (1943); Ex parte Bourne, 300 Mich. 398, 2 N.W.2d 439 (1942); and State v. Andrews, 167 Iowa 273, 149 N.W. 245 (1914).

[7]Ala. Code, tit. 14 § 360 (1940); Ariz. Rev. Stat. tit. 25, § 101 (1956); Ark. Stat. Ann. tit. 55, §§ 104, 105 (1954); Del. Code Ann. tit. 13, § 101 (1953); Fla. Stat. Ann. § 741.11 (1944); Ga. Code Ann. tit. 53, § 106 (1935); Idaho Code tit. 32, § 206 (1947); Burns' Ind. Stat. tit. 44, §§ 104, 105 (1933); Ky. Rev. State. § 402.020 (1959); La. C. C. art. 94 (1952); Ann. Code of Md. art. 27, § 398 (1957); Mo. Rev. Stat. § 451.020 (1949); Neb. Rev. Stat. §§ 42-103 (1943); Nev. Rev. Stat. § 122.180 (1957); N.C. Gen. Stat. c. 51, § 3 (1950); Okl. Stat. tit. 36, § 402 (1956); S.C. Code of Laws tit. 20, § 7; (1952); Tenn. Code Ann. tit. 36, § 402 (1956); Vernon's Tax Stat. art. 4067 (1948); Utah Code Ann. tit. 30, c. 1, § 1 (1953); Code of Va. § 20-54, 20-59 (1950); W. Va. Code Ann. § 4694 (1954); Wy. Comp. Stat. § 50-108 (1945).

[8]Arizona, Delaware, Idaho, Indiana, Kentucky, Nebraska, and Utah.

[9]The California Supreme Court held that their statutes pertaining to miscegenation, Cal. C. C. Sections 60 and 69, were in violation of the Fourteenth Amendment

clared that the regulation of marriage is a power of the state and that the statutes prohibiting miscegenetic marriages are not in conflict with the Fourteenth Amendment.[10] It has also been held that when persons who are prohibited from marrying, leave their state of domicile in order to evade the prohibition, and then return to the state of their domicile, the laws of that state are still controlling, and the marriage is null and void, thus making the parties subject to whatever punishment such state prescribes.[11] The Mississippi statutes on miscegenation are more comprehensive than the statutes in most of the other states. Apparently, no other state has attempted to make "a single act"[12] of miscegenetic adultery or fornication a felony,[13] and so far as this writer can determine, only three other states prescribe a more severe penalty for adultry and fornication, or cohabitation, between a white person and a negro than they do for adultery and fornication or cohabitation between persons of the same race.[14] Only one case has gone to the Supreme Court of the United States to test the validity of a statute which imposed a greater penalty for adultery or fornication committed between a white person and a negro, than adultery or fornication committed between members of the same race. In upholding the validity of this statute, the Court, in *Pace v. Alabama,* 106 U.S. 583 (1883), said: "The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different race . . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the persons of any particular color or race. The punishment of each offen-

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in Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948), by a decision of four to three. There was a vigorous dissent. The statutes prohibited marriage between a white person and a Negro, Mongolian, Malay, or Mulatto.

[10]Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955); Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954); Rogers v. State, 37 Ala. App. 582, 50 So.2d, (1954); Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); In re Paquet's Estate, 101 Ore. 393, 200 Pac. 911 (1932); In re Hobbs, 12 Fed. Cas. 262, No. 6550 (C.C.N.D. Ga. 1871); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871); Frashier v. State, 3 Tex. App. 263, 30 Am. Rep. 131 (1877); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); and Lonas v. State, 50 Tenn. 287 (1871).

[11]Miller v. Lucks, 203 Miss. 824, 36 So.2d 140 (1948). In this case, although the court allowed the white husband of a negro woman (the couple had resided in Illinois) to inherit the property which she owned in Mississippi, it stated that Mississippi would not have had to recognize the marriage if the couple had tried to establish residence within the state. Stevens v. United States, 146 F.2d 120, (10th Cir. 1944); In re Shun T. Takashashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); Eggers v. Olson, 104 Okl. 297, 231 Pac. 483 (1924); State v. Kennedy, 76 N.C. 251, 22 Am. Rep. 683 (1877); Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603 (1885).

[12]The Court also cast doubt on the interpretation of this part of Section 2000 of the Code of 1942. On page 730 in the case of Ratcliff v. State, 107 So.2d 728 (Miss. 1958) the Court said: ". . . it presents a serious question whether or not the persons sought to be brought within the terms of Code Section 2000 by the 1956 amendment must be married to be guilty under the Statute. It is probable that the Legislature meant by use of the words 'persons whose marriage is prohibited' to include persons who are prohibited by law from marrying; and by use of the words, 'which marriage' to mean 'between whom marriage is declared, etc.'"

[13]It is to be noted that this also applies to incestuous fornication or adultery.

[14]Alabama, Florida, and Louisiana.

ding person, whether white or black, is the same."

Certainly recent decisions in the fields of education, transportation, and recreation, would cause one to wonder how long the Supreme Court will allow any statute to stand which uses the term "race" to draw a distinction. However, it is submitted that the Supreme Court will not invalidate the miscegenation statutes, for some time at least. This conclusion is based on the fact that one-half of the states in the Union have miscegenation statutes of some kind, and the further fact that on two different occasions within the last five years the Court has deliberately avoided deciding cases pertaining to miscegenation statutes.[15] Therefore, if Section 2000 of the Code of 1942 is to serve the purpose that the legislature undoubtedly intended it to serve, the section should be amended.[16]

Charles W. Pickering

Federal Declaratory Judgment Act—Actual Controversy In Class Actions

Appellant, a Negro resident of Memphis, Tennessee, boarded a city bus in Memphis and seated himself in the front section of the vehicle. The bus driver told appellant to move to the rear of the bus, and shortly after appellant's refusal to comply, two police officers entered the bus and commanded the appellant to "go to the back of the bus, get off, or be arrested." Thereupon the appellant left the bus and subsequently brought this action for a declaration as to his claimed constitutional right and that of others similarly situated, and for injunctive relief against enforcement of Tenn. Code Ann. §§ 1704-1709 (1955), which require segregated seating on buses such as the one on which appellant rode. The action was dismissed by the District Court[1] on the ground that no "actual controversy" existed within the intendment of the Declaratory Judgment Act,[2] inasmuch as appellant had ridden a bus in Memphis only on this occasion and had "boarded the bus for the purpose of instituting this litigation, and was thus not representative of a class of colored citizens who do use the buses in Memphis as

[15]Naim v. Naim, 167 Va. 80, 87 S.E.2d 749 (1955); *remanded,* 350 U.S. 891 (1955). The Virginia Court ruled that the record had been adequate for both the trial court and the Court of Appeals to render a decision on the merits of the case and that there was no procedure whereby they could follow the order of the United States Supreme Court by sending the case back to the trial court. They then adhered to their former decision. 187 Va. 734, 90 S.E.2d 1849 (1956); *cert. denied,* 350 U.S. 985 (1956). The Supreme Court also denied a writ of certiorari for the case of Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954), at 348 U.S. 888 (1954).

[16]The Section could be amended by inserting the following clause in place of the clause inserted in the Section by Chapter 241, Laws of 1956: ". . . or persons who are prohibited by law from marrying by reason of race or blood and between whom marriage is declared to be unlawful and void." "Unlawful and Void" is used to correspond with the language of Section 459. "Miscegenetic and void" could be used, but in that case Section 459 would probably need to be amended accordingly

[1]3 Race Relations Law Reporter 743 (W.D. Tenn. 1958).

[2]28 U.S.C. § 2201 (1952).

a means of transporation." HELD: Reversed. The District Court erred in not proceeding to the merits in that the facts constitute an "actual controversy," notwithstanding that appellant rode the bus only on this occasion and that he did so solely for the purpose of bringing this action. *Evers v. Dwyer,* 79 S. Ct. 178 (1958).

The law is well settled that a declaratory judgment action is available only in those cases involving an actual controversy.[3] The principles of law relating to the elements necessary to constitute an actual controversy are equally well settled. There seems to be universal agreement that a controversy in the constitutional sense[4] must be one that is appropriate for judicial determination, be definite and concrete, touching legal relations of parties having adverse legal interests, and be a real and substantial controversy admitting of specific relief through a decree of conclusive character.[5] That the judicial power does not extend to giving advisory opinions or to determination of abstract or hypothetical propositions also has been formally acknowledged.[6] It is apparent that the words and phrases so used in promulgation of the requisite elements of an "actual controversy" are of such general nature[7] that application to factual situations is largely a matter of judicial discretion and degree[8]—with the right of final determination necessarily being retained by the highest court. When it is considered that these few legal principles must be applied to all the many and diverse areas of law,[9] it is evident that these principles must be general, and that the matter is largely one of judicial discretion with residual finality in the foremost tribunal is evidenced by the frequent reversals of lower court decisions on this point.[10] In class actions instigated to contest

[3]Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941); Chicago Pneumatic Tool Co. v. Hughes Tool Co., 61 F. Supp. 767 (D.C. Del. 1945), *aff'd,* 156 F.2d 981 (8th Cir. 1946), *cert. denied,* 329 U.S. 781, (1946); Skelley Oil Co. v. Phillips Petroleum Co., 174 F.2d 89 (10th Cir. 1949), *reversed in part and vacated in part,* 339 U.S. 667 (1950); Nukk v. Shaughnessy, 125 F.Supp. 498 (S.D.N.Y. 1954), *reversed,* 350 U.S. 869 (1955).

[4]U.S. Const. art III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity . . . ."

[5]Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, (1937); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[6]Ashwander v. TVA, 297 U.S. 288 (1936); Coffman v. Breeze Corp., 323 U.S. 316 (1945); United Public Workers v. Mitchell, 330 U.S. 75 (1947); American Machine & Metals v. De Bothezat Impeller Co., 75 F.Supp. 421 (S.D.N.Y. 1947), *reversed,* 166 F.2d 535 (2d cir. 1948).

[7]For example: ". . . appropriate for judicial determination . . . ," ". . . touching legal relations . . . ," ". . . substantial controversy . . . ," ". . . adverse legal relations . . . "

[8]Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941); Crowell v. Baker Oil Tools, 49 F.Supp. 552 (S.D. Cal. 1943), *reversed,* 143 F.2d 1003 (9th Cir. 1944), *cert. denied,* 323 U.S. 760, (1944).

[9]As examples: Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), (insurance); Douglas v. City of Jeanerette, 319 U.S. 157 (1943), (freedom of religion); Perkins v. Elg, 307 U.S. 325 (1939), (citizenship); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952), (interstate commerce); Terry v. Adams, 90 F. Supp. 595 (S.D. Tex. 1950), *reversed sub nom,* Adams v. Terry, 193 F.2d 600 (5th Cir. 1952), *reversed,* 345 U.S. 461, (1953), (right to vote).

[10]A graphic illustration of the discretionary nature and of the ease with which reversals are made is presented in Nukk v. Shaughnessy, 125 F. Supp. 498 (S.D.N.Y. 1954), *reversed,* 350 U.S. 869 (1955), where the District Court expounded the proposition that no "actual controversy" existed, stating, "Here the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for

legislation on the ground that it denies equal protection of the laws, in order to present an "actual controversy," a party complaining must show that he is a member of the class discriminated against.[11] It is on this point that the District Court and the Supreme Court have a parting of the ways, for the former places emphasis on the fact that the appellant rode the bus *solely* for the purpose of creating a lawsuit, taken in conjunction with the fact that the appellant's bus trip was his *only* venture on a city bus in Memphis. To the District Court, therefore, the appellant was not a bona fide member of the class of Negro bus patrons. The Supreme Court, however, treating the statute as if it discriminated against all Negroes, not merely Negro bus patrons, made little or nothing of these facts, citing for support two cases, *Young v. Higbee Co.*[12] and *Doremus v. Board of Education,*[13] both of which involved monetary or "pocket-book" interests. In the latter case, a taxpayer's action, the court held the litigant's interest to be insufficient to allow the action to be maintained. The Supreme Court cited, in addition to the above cases, *Gayle v. Browder,*[14] more renowned as the *Montgomery Bus Case,* in which the effects of statutes and ordinances requiring segregated seating on buses in Montgomery were abolished. However, it appears in that case that the "actual controversy" issue was not raised, and a reading of the case shows that the parties contesting the statutes and ordinances were bus users *prior* to the incidents out of which the controversy arose. By comparison, it would seem that the reversal of the District Court in the noted case will have the effect of lessening the judicially imposed requirements of legal status necessitous in maintaining class actions of this kind, that is to say, that this decision implies that a party, unaffected by the operation of a statute or ordinance, but desirous of contesting the validity of such legislation, may raise constitutional questions simply by feigning membership in the class affected.[15]

In view of the general nature of the elements requisite to comprise an "actual controversy," one cannot validly assert criticism for a court's finding or failure to find an "actual controversy." Each finding or failure to find an "actual controversy" must be reached through the

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reasonable debate . . . ." The Supreme Court, in reversing without an opinion, held that an "actual controversy" did exist. The discretionary nature of reversals made on the point of "actual controversies" is further illustrated in the principal case under consideration, in the fact that both the District Court and the Supreme Court cite the same case, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941), and quote the same passage in support of their holdings, but reach opposite conclusions.

[11]Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915); Shelley v. Kraemer, 334 U.S. 1 (1948). Another case, Barrows v. Jackson, 346 U.S. 249 (1953), suggests a modification of the rule. That case involved the constitutionality of a racially restrictive covenant, the issue being raised by one not a Negro. The court in that case stated, however, that this principle "has no application in the instant case" because a judgment against the defendant "would constitute a direct, pocketbook injury to her." It is evident that no monetary in jury was incurred in the principal case.

[12]324 U.S. 204 (1945).

[13]342 U.S. 429 (1952).

[14]142 F.Supp. 707 (M.D. Ala. 1956), *aff'd,* 352 U.S. 903 (1956).

[15]In other cases involving class actions of a civil rights nature, the interests of the party or parties bringing the actions appear to be primarily for the benefit of

court's discretion and opinion, with the discretion exercised and the opinion formulated in light of the facts in each case as it is presented for adjudication. However, it also appears, without doubting the court's power of discretion in this regard, that such discretion may be abused and should be handled carefully. For example, if the Supreme Court's decision in the noted case is construed to mean that persons not bona fide members of a class can bring actions on behalf of bona fide members, persons interested only in undermining public policy and in rabble-rousing will be enabled to stir up litigation where such litigation is unwarranted and needless merely by the legerdemain of bringing themselves superficially within a class and posing as a bona fide member. If this construction of the noted case is followed, it will serve to create lawsuits and friction with public policy, both of which currently exist in over-abundance, and such a construction thus should be frowned upon and watched warily as an invitation sounding in uncompensated champerty.

John Ernest Mulhearn, Jr.

EMINENT DOMAIN — EFFECT OF ANTICIPATED SALE OF CONDEMNED LAND UPON TAKING FOR A PUBLIC USE AND NOT FOR A PRIVATE USE

The Pearl River Industrial Commission was created by Chapter 169, of the Mississippi Laws of 1956, to investigate the economic and engineering feasibility of developing the region bordering the Pearl River for industrial and recreational purposes. The investigation having proved that development was possible, the Mississippi Legislature, in Senate Bill 1724, authorized the creation of the Pearl River Valley Water Supply District to carry out the desired development. Organization and establishment of the District was to be according to the plan enunciated in Senate Bill 1724. The Commission was required to petition the Chancery Court of the First Judicial District of Hinds County for the creation of the District. A hearing was held at which appellants and other parties defendant had an opportunity to state reasons why the District should not be created. The Chancellor stated that the facts

such parties instituting the litigation as well as for the benefit of other members of the class. For example: Terry v. Adams, 90 F.Supp. 595 (S.D. Tex. 1950), *reversed sub. nom.* Adams v. Terry, 193 F.2d 600 (5th Cir. 1952), *reversed*, 345 U.S. 461 (1953), held that Negro citizens and voters of a county could sue for themselves, and for those similarly situated in a suit against officers of a political association composed of white voters, and for a decree declaring that Negro voters were legally entitled to vote in elections held by the association. Davis v. Cook, 80 F.Supp. 443 (N.D. Ga. 1948), held that certain Negro teachers could maintain a class action alleging discrimination against Negro teachers in the application of salary schedules. In Monk v. Birmingham, 87 F.Supp. 538 (N.D. Ala. 1949), *aff'd sub nom,* Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. U.S. 940 (1951), the court allowed Negro property owners to bring a class action for a declaration that racially-restrictive zoning ordinances were invalid. The court in Holmes v. Atlanta, 124 F.Supp. 290 (N.D. Ga. 1955), *aff'd*, 223 F.2d 93 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955), permitted Negro citizens to maintain an action for themselves and other Negroes similarly situated for declaratory judgment and granted an injunction to enjoin city officials from preventing Negro citizens' use of city golf courses.

showed the practicability of creating the District and ordered an election in the counties involved. After an overwhelming approval by the electorate, the Chancellor entered a Final Decree creating the District. Appellants contend that the District will be vested with unconstitutional powers because it is authorized to take private property by eminent domain for private use thereby violating Sections 14 and 17 of the Mississipppi Constitution and the Fourteenth Amendment of the U. S. Constitution. HELD: Affirmed. The primary purpose for taking the land was for public use. The incidental private benefit from subsequent resale of the property was not of sufficient magnitude to defeat the right of exercise of eminent domain. *Culley v. Pearl River Industrial Commission,* 108 So.2d 390 (Miss. 1959).

The Mississippi Constitution states that private property may be taken for public use only upon payment of just compensation.[1] It further asserts that the question of "public use" is judicial. Some courts have strictly interpreted the phrase so that the general public must have a fixed use of the appropriated property as a matter of right[2] and not merely receive a benefit or convenience from the property.[3] A more liberal construction is given by other courts in holding that public use means public benefit or advantage.[4] Once the fact of public use has been established, the right of eminent domain will not be defeated merely because there is some incidental private benefit.[5] It is only when the private benefit is so great that it predominates[6] or when the private benefit cannot be separated from the public use[7] that a sovereign cannot exert the power of eminent domain. Invariably, when the statute providing for eminent domain includes a provision for the future sale or lease of the lands acquired, the contention is made that the taking is not for a public use since there is the possibility that the land will return to the hands of private citizens. The problem arose seldom, if at all, in the early days of our country.[8] One can attribute this to the

[1]Miss. Const., Art. III, § 17 (1890).

[2]U.S. v. Certain Lands in City of Louisville, 297 U.S. 726 (1935); Ferguson v. Illinois Central R. Co., 202 Iowa 508, 210 N.W. 604, 54 A.L.R. 1 (1926); Collins v. Public Service Commission, 365 Mo. 1086, 293 S.W.2d 345 (1956).

[3]Memphis Freight Co. v. Memphis, 4 Coldw. 419 (Tenn. 1867); Peaby-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483, 172 A.L.R. 168 (1947); Crommett v. City of Portland, 150 Me. 217, 70 A.2d 841 (1954); Edens v. Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

[4]People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st. Cir. 1946), *cert. denied,* 329 U.S. 722 (1946); Gohid Realty Co. v. Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277, 172 A.L.R. 953 (1947).

[5]2 Nichols, Eminent Domain 447 (3d ed. Sackman and Van Brent 1950): "If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will enure to private individuals." See also: Ermels v. Webster City, 246 Iowa 1305, 71 N.W.2d 911 (1955); Ottawa Hunting Association, Inc. v. State, 178 Kan. 460, 289 P.2d 754 (1955); People v. Public Building Commission of Chicago, 11 Ill. 2d 125, 142 N.E.2d 67 (1957); In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N.W.2d 340 (1951).

[6]29 C.J.S., Eminent Domain § 29 (a), p. 817; 18 Am. Jur., Eminent Domain § 34, p. 658 and cases cited there.

[7]Kessler v. Indianapolis, 199 Ind. 420, 157 N.E. 547, 53 A.L.R. 1 (1927); Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952).

[8]A look at the cases decided before the turn of the century will show the problem of resale involving the question of reversionary interests and the type of title acquired by eminent domain as determining the type of title to be sold rather than determining the question of the effect of resale upon the "public use."

fact that at first "public use" was more strictly interpreted and was applied not only to the initial taking but also to the subsequent use of the property. As the courts have expanded the limits of "public use,"[9] the legislatures and Congress have acted accordingly. Railroads, mining facilities, power plants, irrigation companies and other projects which benefit the public generally, but which are owned and operated by private corporations for private profit, were said to perform enough good for the public to permit the use of eminent domain in their support. Once the courts allowed the legislatures to delegate the power of eminent domain to accomplish those public uses, it was only a natural step for the legislature to try to condemn for a public purpose and to provide for the subsequent sale of the land for private profit as a means of continuing the public purpose. Although cases dealt with this problem earlier,[10] the area in which the problem of resale and public purpose has received more attention is in the area of urban redevel-

[9]It is interesting to watch the language of the courts as time progresses and as more social legislation is passed. As our population rapidly increases, the demand for space on which to build has become great. The people are relying more and more upon government to participate in areas heretofore thought of as being solely within the realm of individual rights and privileges. Witness the District Court of the District of Columbia in 1953: "The traditional concept of use as the keystone of eminent domain has been enlarged in modern thought and cases. We find it described as public purpose. The variation in the term from public 'use' to 'purpose' indicates a progression in thought . . . . These extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government. And it behooves the court to be alert lest currently attractive projects impinge upon fundamental rights . . . . That the Government may do whatever it deems to be for the good of the people is not the principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited." Schneider v. District of Columbia, 117 F.Supp. 705 (D.C.D.C. 1953). It took only three years for this warning to become a mere echo. The Kansas Supreme Court said in 1956: "The concept of the terms public purpose, public use, and public welfare, as applied to matters of this kind, must be broad and inclusive. As community life becomes more complex and our cities grow and become overcrowded, the need to use, for the public benefit, areas which are not adapted to the pressing needs of the public, becomes more imperative." State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P.2d 656 (1956). Last June the warning given in 1953 by a federal court had faded into oblivion as a state court said: "Condemnation of property nearly always results in some inconveniences to those whose property is taken but the test which we should and must apply is 'the greatest good for the greater number.'" Amsterdam Parking Authority v. Trevett, 174 N.Y.S. 2d 832 (N.Y. 1958).

[10]A leading case in this area and one that would seem to answer expressly the contentions of the appellant is the case of In re City of Rochester, 137 N.Y. 243, 33 N. E. 320 (1893). The New York legislature gave the City of Rochester the power to condemn land for a public park and to sell the land when it was no longer of any use. The contention there, as by appellants in this case, was that the sale made the taking for private purposes. The New York court said: "Of course the city could not take private property for the purpose of selling it or dealing in it; but having once acquired it for a park, and it becoming, in the course of time, unnecessary or useless for that purpose, by the growth of the city or other changes in the situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation, and power to that end, conferred at any time, or in the act authorizing the taking, cannot invalidate the taking, cannot invalidate the delegated right to exercise the power of eminent domain."

opment.[11] The theory behind this program is that the removal of slums is a public benefit. Once the public has been benefited by their removal, there is no reason for the land to go unused; so the courts have permitted sale of the land to private persons for profit.[12] This concept has been accepted in other areas of human experience by most jurisdictions so that now one might say that the rule is: the fact that a subsequent resale of lands acquired by eminent domain is anticipated has little effect, if any, upon the judicial determination of whether or not land was taken for a public use.[13] The question of resale might once again play an important role in the determination of public use when a statute, as the one in the noted case, includes provisions that make it possible for land in excess of the amount needed, to be condemned, and to be sold for private profit to others. If this is the case, then the use of the power of eminent domain is unconstitutional since it is generally accepted that property in excess of that required for public use may not be taken by eminent domain and sold for private profit.[14]

On the basis of the majority opinion, it is assumed that Mississippi will follow the trend in giving the broad meaning of public benefit to the words of the Constitution, "public use;" and that Mississippi will follow the other trend in holding that a provision for sale of the lands back to private persons for their profit does not affect the power of eminent domain if the initial taking is for the public use. It is sub-

[11]The Housing Authorities Act, Miss. Code Ann. § 7295 (1942), et seq., is similar to the urban redevelopment acts of other states. Note that Section 7300 (d) expressly gives the authority the power to obtain land by eminent domain and subsequently to sell the property.

[12]Some courts have followed the thoughts of the court in Zurin v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945), and declared that slum clearance, per se, is for public benefit and use and that subsequent sale is merely an incidental private benefit. Other courts follow Rowe v. Housing Authority of City of Little Rock, 220 Ark. 698, 249 S.W.2d 551 (1952) and declare that the public benefit does not stop with the clearing of the slum but continues and encompasses the subsequent sale to private persons and to the improvements which they make—granted that they are made for private profit—upon the land. The same result is obtained with either approach.

[13]The courts have reached this conclusion generally throughout the United States since almost all resale provisions in an eminent domain statute permit the sale when the condemning agency feels that retention of the land is no longer for a public purpose. When the land acquired is no longer necessary for public use, the agency owning the land "may dispose of property which is acquired in fee . . . , without destroying the public nature of the original acquisition." Sanitary District of Chicago v. Manassee, 380 Ill. 27, 42 N.E.2d 543 (1942). See also: Papandinis v. City of Somerville, 331 Mass. 637, 121 N.E.2d 714 (1954); Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277, 172 A.L.R. 953 (1947); Foeller v. Housing Administration of Portland, 198 Ore. 205, 256 P.2d 752 (1953); In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N.W.2d 340 (1951); Vilib v. Housing Authority of the City of Dallas, 287 S.W.2d 323 (Texas 1955); Schenider v. District of Columbia, 117 F. Supp. 705 (D.C.D.C. 1953); State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P.2d 656 (1956); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943); David Jeffery Co. v. Milwaukee, 267 Wis. 559, 66 N.W.2d 362 (1954); Wright v. Walcott, 238 Mass. 432, 131 N.E. 291 (1921); Driscoll v. New Haven, 75 Conn. 92. 52 Atl. 618 (1902); U.S. v. 243.22 Acres of Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618 (1902); U.S. v. 243.22 Acres of Land in Village of Farmingdale, 43 F.Supp. 561 (E.D.N.Y. 1942); People v. Chicago, 394 Ill. 477, 68 N.E.2d 761 (1946); Borek v. Galler, 74 N.Y.S.2d 675 (N.Y. 1958).

[14]Cincinnati v. Vester, 33 F.2d 242, (6th Cir. 1929); Truitt v. Borough of Ambridge Water Authority, 389 Pa. 429, 133 A.2d 797 (1957); State v. Superior Court, 325 P.2d 300 (Wash. 1958).

mitted, however, that this case cannot be cited as authority for those propositions because the Court had no jurisdiction to rule on the question of public use. The majority opinion stated that according to Section 17 of the Mississippi Constitution, the question of public use is a judicial one. Justice Ethridge then stated for the majority: "We adjudicate here that the one-quarter mile perimeter area, if taken by eminent domain, will be for a public use. The undisputed evidence so shows." It is submitted that the statement was without the jurisdiction of the court because it amounted to a declaratory judgment. The procedure for judicially determining whether or not land to be taken by eminent domain is for public use is expressly set forth by statute.[15] That procedure was not followed in this case. The question of the use for which the lands are to be taken was not in issue,[16] yet the court ruled upon it. An earlier decision,[17] also written by Justice Ethridge, states: "That Sec. 2782 (of the Miss. Code Ann. (1942)) is an express statutory grant of power to the *circuit court* to test the question of public necessity, and to enjoin an eminent domain proceeding until the *circuit court* decides the necessity issue on the petition for writ of prohibition. ". . . We think that Code Sec. 2782 establishes the *exclusive remedy and tribunal* for determining the question of public necessity . . . . In brief, *there is no way to test judicially the issue of public necessity except by a petition for a writ of prohibition under Code Sec.* 2782." It is submitted that although the Court decided the case on a point not in issue and without its jurisdiction, the result reached in the noted case is in line with the trend in the United States today and has ample authority to support it. The mere fact that provisions are made for resale of lands condemned by eminent domain is not enough to extinguish that power because the taking is alleged to be for private use rather than for public use.

Lee Davis Thames

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[15]Miss. Code Ann. § 2750 (1942), establishes an eminent domain court. Section 2751 requires the agency having eminent domain powers to apply to the eminent domain court for exercise of the power. Those owning the property to be condemned are made parties defendant. Section 2756 requires a separate trial for each person if the property of more than one person is to be condemned. (Note that the principal case deals with Mr. Culley and Dr. Walker together and that the many others persons owning property in the five counties in which land is to be condemned are not even parties to this action—much less to the separate action to which they are entitled by section 2756). Section 2782 sets up the procedure for determining "whether there is a public necessity for the taking of the particular property or a part thereof which it is proposed to condemn." The cause is to be tried by the circuit judge in the circuit court after he has issued a temporary order stopping the hearings in the eminent domain court until this issue has been decided. Appeal may be made to the Supreme Court of Mississippi.

[16]The Chancellor in the lower court properly recognized the fact that the question of public use was not at issue and was not in his jurisdiction. In his opinion, which was dictated into the record, he said that the "objections (of the appellants) . . . made at this hearing are not as to the creation of the Pearl River Water Supply District itself. The objections go to the question, of course, of the value of the lands, and also the question of the taking of particular lands, whether the use for which such lands would be taken would be a public use, and as the Court sees it, that would be a judicial question to be determined in a court of eminent domain, and is not in issue in this proceeding."

[17]Erwin v. Mississippi State Highway Commission, 213 Miss. 885, 58 So.2d 52 (1952).

INCOME TAXATION — DISALLOWANCE OF PURCHASE OF LIQUOR AS A BUSINESS DEDUCTION

Appellee, an Oklahoma attorney, brought this action against the United States to recover excessive income tax paid, claiming a deduction for the purchase price of liquor bought for entertainment of clients and prospective clients in accordance with the usual practice in the locality. From an allowance of the deduction, the Commissioner appeals, not contesting the "ordinary and necessary" nature of the deduction,[1] but claiming that the allowance would be a severe and immediate frustration of the public policy of the state of Oklahoma.[2] HELD. Reversed. There was a severe and immediate frustration of the policy of a dry state, therefore the deduction of the cost of liquor cannot be allowed as an ordinary and necessary business expense. *United States v. Winters,* 261 F.2d 675 (10th Cir. 1958).

The Internal Revenue Code of 1954 states that "there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying out any trade or business."[3] Neither the 1939 Code or the 1954 Code has expressly proscribed or prohibited the deduction of any payment as a business expense on the ground that such payment was against public policy. Although the question of deductibility of expenses which violate a federal or state law was not in issue, the Supreme Court, in *Lilly v. Commissioner,*[4] recognized that such expenditures by virtue of their illegality might not be ordinary and necessary business expenses.[5] Also, in *Commissioner v. Heininger,*[6] it was recognized that the federal courts have narrowed the meaning of the language permitting the deduction of ordinary and necessary business expenses "in order that tax deduction consequences might not frustrate sharply defined national or state policies prescribing particular types of conduct." However, in a recent case,[7] the Supreme Court held that rent and wages paid in the operation of bookmaking establishments, though illegal under state law, were deductible as ordinary and necessary expenses.

In the noted case, the Court based its decision "on the fact that the liquor was possessed and used for business purposes."[8] It was not denied that possession of intoxicating liquor by an individual for his own personal use is not unlawful in Oklahoma.[9] Hence, it seems that "a

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[1]Int. Rev. Code § 162 (1954).

[2]See note 11 infra.

[3]See note 1 supra.

[4]343 U.S. 90 (1952).

[5]Accord: Boyle, Flagg & Seaman, Inc., 25 TC 43 (1955).

[6]320 U.S. 467 (1943). See Comm'r. v. Doyle, 231 F.2d 635 (7th Cir. 1956), in which expenses for rent and wages incurred in the operation of an illegal gambling business in Illinois, which were themselves contrary to a sharply defined and declared public policy of that state, were deductible for income tax purposes as ordinary and necessary expenses, inasmuch as the statute makes no distinction between lawful and unlawful disbursements, and the expenses sought to be deducted were an integral part of the business. Accord: Louis Cohen, TC Memo 1958-67; George G. Elmer, TC Memo 1958-108. An interesting survey of the question in point can be found in Stapleton, The Supreme Court Redefines Public Policy, 30 Taxes 641 (1952).

[7]Comm'r. v. Sullivan, 356 U.S. 27 (1958).

[8]261 F.2d 675, 678 (10th Cir. 1958).

[9]Dawson v. State, Okl. Cr., 273 P.2d 154 (1954).

personal use of alcoholic liquors for the gratification of social guests is in a different category from the business use of such liquors for the attainment of commercial objectives;"[10] this was possession of liquor for a purpose contrary to the Oklahoma Prohibition Ordinance and statutes.[11] The Court inferred[12] that the question to be determined in the instant case would be peculiar to the States of Oklahoma and Mississippi—these being the only so-called dry states. However, the applicable Oklahoma laws[13] do not ban the possession of liquor, as does Mississippi law.[14] Possession of liquor in Mississippi is illegal for any purpose, and it appears that an argument for deduction of the purchase price of liquor would be in vain in light of the principal case. It is significant, in the noted case, that there has never been a conviction reported for serving intoxicating liquor to business guests in one's own home in Oklahoma. Thus, it seems that the Court of Appeals, and not the State of Oklahoma, is determining what is against the public policy of the State of Oklahoma. This decision seems hard to rationalize with other decisions that have allowed deductions for expenses connected with illegal activities.[15]

L. T. Senter, Jr.

TORTS—MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES TO USERS OF DEFECTIVE SIDEWALK

Plaintiff-pedestrian sustained personal injuries in a fall on the depressed portion of a sidewalk, curb, and gutter. Defendant-city contends that pedestrian's own negligence contributed toward her injuries. It was a bright, clear day, but pedestrian failed to see a break in the curbing which had been there for several years. HELD: Affirmed. In absence of prior knowledge of defect in curb, pedestrian had a right to assume, and act upon the assumption, that the sidewalk was in a reasonably safe condition for travel. *Hunt v. Tooele City,* 334 P.2d 555 (Utah 1959).

Municipal sidewalks are intended for the public use, and a person without prior knowledge of a defect may assume and act upon the assumption that the municipality has fulfilled its duty of keeping the sidewalk in a reasonably safe condition.[1] However, responsibility for

[10]261 F.2d 675, 678 (10th Cir. 1958).

[11]1 Oklahoma Statutes Ann. p. 929 (Oklahoma Prohibition Ordinance). 37 Oklahoma Statutes Ann. §§ 1, 31, and 50.1.

[12]261 F.2d 675, 680 (10th Cir. 1958).

[13]See note 10 supra.

[14]Miss. Code Ann. § 2613 (1942).

[15]See note 6 supra.

[1]McGurk v. Shreveport, 2 So.2d 687 (La. 1941); Clinton v. West Monroe, 187 So. 561 (La. 1939); City of Decatur v. Gilliam, 222 Ala. 377, 133 So. 25 (1931); City of Jackson v. Clark, 152 Miss. 731, 118 So. 350 (1928); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); Reinach v. San Francisco, 331 P.2d 1006 (Cal. 1958); Taverna v. City of Hoboken, 43 N.J. Super. 160, 128 A.2d 11 (1956); Taggert v. Kansas City, 156 Kan. 478, 134 P.2d 417 (1943); Watkins v. Town of Cicero, 312 Ill. App. 380, 37 N.E.2d 785 (1941); City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276 (1936); Kennedy v. City of Everett, 2 Wash. 2d 65, 99 P.2d 614 (1940); Tyler v. City of Richmond, 168 Va. 308, 191 S.E. 625 (1937); Gurney v. Rapid City, 74 S.D. 194, 50 N.W. 360 (1951); Bills v. Salt Lake City, 37 Utah 507, 109 Pac. 745 (1910).

injury to a pedestrian exists only when a defective condition is dangerous, or calculated to do injury,[2] and when the city has actual or constructive knowledge of the defective condition.[3] After the lapse of a reasonable amount of time, knowledge is implied.[4] Although a person who has never been on the particular sidewalk should be somewhat more alert, a failure to do so would not constitute negligence per se.[5] A pedestrain must exercise ordinary care while using a public sidewalk, but this does not mean constant observation such as "keeping the eyes glued to the sidewalk."[6] An examination of case law in the United States indicates that the following are elements of "ordinary care:" A person must walk with his eyes open and observe his general course,[7] but mere abstraction or lack of attention to the condition of the sidewalk is not negligence;[8] One must have in mind that there exist irregularities brought about by natural causes such as rains, expansion, soil erosion, and tree roots.[9] Pedestrians are not required to watch every step,[10] nor to anticipate "traps" or defects,[11] but they must see what is obvious and apparent and what would be noticed by an ordinary prudent passerby.[12] However, if a person's attention is momentarily or temporarily diverted by reason of which he does not see the defect or

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[2]James v. New Orleans, 121 So. 879, (La. 1923); Smith v. Krebs 166 Kan. 586, 203 P.2d 215 (1949); Miller v. New Orleans, 152 So. 141 (La. 1934).

[3]Cobb v. Town of Winnsboro, 49 So.2d 625 (La. 1950); Bodenheimer v. New Orleans, 18 So.2d 224 (La. 1944); Hattiesburg v. Reynolds, 124 Miss. 352, 86 So. 853 (1921); Birmingham v. Martin, 228 Ala. 318, 153 So. 235 (1934); Johnson v. City of Opelika, 260 Ala. 551, 71 So.2d 793 (1954); Loewen v. City of Burbank, 124 Cal. App. 2d 551 (1954); Louisville v. Verst, 308 Ky. 46, 213 S.W.2d 517 (1948); Ross v. Long Beach, 133 N.Y.S. 149 (N.Y. 1954); Knoxville v. Ferguson, 34 Tenn App. 585, 241 S.W.2d 612 (1951); City and County of Denver v. Dugdale, 127 Colo. 373, 256 P.2d 898 (1953).

[4]Baker v. Granite City, 311 Ill. App. 586, 37 N.E.2d 372 (1941); Billings v. Witchita, 144 Kan. 742, 62 P.2d 869 (1937); Mathews v. City of Richmond, 291 Kv. 387, 164 S.W.2d 968 (1942); City of Norman v. Sallee, 205 Okla. 1419, 238 P.2d 292 (1951).

[5]Clevenger v. Seattle, 29 Wash.2d 167, 186 P.2d 87 (1947); Ashley v. City of Aberdeen, 46 Wash. 385, 90 Pac. 210 (1907); Linquist v. Seattle, 67 Wash. 230, 121 Pac. 449 (1912); Bentley v. Rothschild Hat Co., 144 Mo. App. 612, 129 S.W. 249 (1910); McManus v. New Jersey Water Co., 22 N.J. 253, 91 A.2d 868 (1952); Blasick v. City of Yakima, 274 P.2d 122 (Wash. 1954).

[6]Weber v. Union Development & Construction Co., 118 La. 77, 42 So. 652 (1906); Lemoine v. City of Alexandria, 151 La. 77, 92 So. 58 (1922): City of Montgomery v. Ross, 195 Ala. 362, 70 So. 634 (1916); City of Decatur v. Gilliam, 222 Ala. 377, 133 So. 25 (1931); Peters v. San Francisco, 41 Cal.2d 419, 260 P.2d 55 (1953); Birdsong v. Clarksdale, 191 Miss. 532, 3 So.2d 827 (1941); Shepard v. City of Aurora, 5 Ill. App.2d 12, 124 N.E.2d 584 (1954); Batts v. City of Nashville, 22 Tenn. App. 418, 123 S.W.2d 1099 (1939); Kaznowski v. City of LaSalle, 316 Ill. App. 115, 43 N.W.2d 852 (1942).

[7]Hebenheimer v. St. Louis, 269 Mo. 92, 189 S.W. 1180 (1916).

[8]City of San Diego v. Perry, 124 F.2d 629 (9th Cir. 1942).

[9]White v. City of Alexandria, 216 La. 308, 43 So.2d 618 (1949).

[10]Lovins v. St. Louis, 90 S.W.2d 430 (Mo. 1936).

[11]Emmey v. Stanley Co. of America, 139 Pa. Supp. 69, 10 A.2d 795 (1940).

[12]Glatstein v. Shreveport 149 So. 158 (La. 1933); Massicot v. New Orleans, 43 So.2d 621 (La. 1950); McMurphy v. Pipkin, 260 Ala. 203, 69 So.2d 682 (1954); Woodson v. Metropolitan Street Railway, 224 Mo. 685, 123 S.W. 820 (1909); Kelly v. Kansas City, 153 Mo. App. 484, 133 S.W. 670 (1911); Anderson v. City of Wilmington, 70 Atl. 204 (Del. 1907); Learner v. Philadelphia, 221 Pa. 294, 70 Atl. 755 (1908); Glover v. City Council of Augusta, 83 Ga. 314, 63 S.E.2d 422 (1951); Belmont v. Isenhour, 249 N.C. 106, 105 S.E.2d 431 (1958); Russakoff v. City of Stamford, 134 Conn. 450, 58 A.2d 517 (1948); City of Louisville v. Verst, 213 S.W.2d 517 (Ky. 1948).

obstruction in time to avoid it, he is not thereby precluded from recovery as a matter of law.[13] If a pedestrain looks toward and does not see, or should have seen a defect or obstruction, the authority is divided as to whether he is[14] or is not[15] guilty of contributory negligence. Should a person know of a defective or dangerous condition, he is not precluded from using a walk but he must look for such defect, and exercise such care and diligence as a prudent man would exercise in view of the danger.[16] A minority[17] of jurisdictions hold that this is assumption of risk and refuse to allow recovery.

To impose upon a municipal corporation a duty of immediate repair of a slight defect in one of its sidewalks is to require the impossible. The rule today states that only sizeable and inherently dangerous defects require such attention. The requirement that the city be notified either by lapse of time or actual notice further limits its responsibility and keeps the rule within reason. The great weight of authority in the United States today gives a pedestrian the right to assume that municipal sidewalks are in reasonably safe condition. This is limited by the requirement of "ordinary care" and a duty to see the obvious. The noted case strengthens the pedestrian's position—holding that "looking at and failing to see" a defective condition is not necessarily contributory negligence but that the proximate cause was the negligence of the city in failing to keep its sidewalks in repair. The defect having been there "several years," the attempted but unsuccessful repair, and its latent dangerous qualities clearly demonstrates the negligence of the municipal corporation.

William H. Cox, Jr.

Torts—Owners And Occupiers Of Land—Classification Of Licensees And Invitees

Plaintiff's husband operates a cafe, service station, and tourist court on the south end of a large commercial lot which lies adjacent to

[13]City of Ashland v. Boggs, 161 Ky. 728, 171 S.W. 461 (1914); Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576 (1894); Chicago v. Babcock, 143 Ill. 358, 32 N.W. 271 (1892); City of Valpariso v. Schwerdt, 40 Ind. App. 608, 82 N.E. 923 (1907); Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657 (1887).

[14]Schlossberg v. Brugh, 167 Va. 49, 187 S.E. 487 (1936); Lane v. Dickinson, 276 Pa. 306, 120 Atl. 264 (1923); Bailey v. Columbia Grocery Co., 73 Ind. App. 58, 124 N.E. 784 (1919); O'Neill v. St. Louis, 292 Mo. 656, 239 S.W. 94 (1922); Donnelly v. Real Estate Management Corp., 342 Ill. App. 453, 96 N.E.2d 820 (1951); Welling v. City of Charlotte, 241 N.C. 312, 85 S.E.2d 379 (1955).

[15]MacLean v. San Francisco, 151 Cal.2d 133, 311 P.2d 158 (1957); Balcom v. City of Independence, 178 Iowa 685, 160 N.W. 305 (1916); White v. Harrisburg, 342 Pa. 556, 20 A.2d 751 (1941); City of Macon v. Stevens, 42 Ga. App. 419, 156 S.E. 718 (1931).

[16]Cloutier v. City of Owosso, 343 Mich., 238, 72 N.W.2d 46 (1955); Franklin v. Edwardsville, 4 Ill. App. 2d 495, 124 N.E.2d 357 (1957); Venturalli v. Chicago, 337 Ill. App. 283, 85 N.E.2d 352 (1949); Clark v. Joslin Dry Goods Co., 128 Colo. 317, 262 P.2d 546 (1953); Swenson v. City of Rockford, 9 Ill. App. 122, 136 N.E.2d 777 (1956); Baltimore v. Grossfeld, 173 Md. 197, 195 Atl. 554 (1938); El Paso v. Mendoza, 191 S.W.2d 102 (Texas 1946).

[17]Burcham v. City of Mullens, 83 S.E.2d 505 (W. Va. 1954); Prass v. Cincinnati, 98 Ohio App. 468, 129 N.E.2d 873 (1953); Allen v. Dillman, 249 S.W.2d 23 (Ky. 1952).

and south of her home lot. The area of the commercial lot between the plaintiff's home lot and the business establishments is vacant and graveled. For five years prior to August 21, 1957, plaintiff frequently passed from her home to her husband's business establishment to assist her husband in his business endeavors, and during that time used a path which was noticeably well traveled from her house to the graveled commercial lot. With the permssion of plaintiff's husband, the defendants, on August 19, 1957, unloaded steel pipe in stacks two feet high on the vacant portion of said commercial lot. After dark, on August 21, 1957, plaintiff, while walking along the path to her husband's business establishments, fell over the stacked pipe, severely injuring herself. Mrs. Bishop charged the defendants with negligence for blocking the path and for failing to place warning rails and lights. The defendants demurred to the declaration. HELD: Demurrer sustained. No cause of action was stated since the plaintiff was a licensee, and the defendants, as occupiers of land, were not liable for ordinary negligence to a licensee. *Bishop v. Stewart,* 106 So.2d 899 (Miss. 1958).

The sufficiency of the demurrer depended upon the Court's determination as to whether plaintiff was a licensee or an invitee when she fell over the stacked pipes. According to well established precedents, an owner or occupier of land violates his duty to an invitee when he negligently allows conditions to exist on his property which imperil the safety of persons upon the premises.[1] A licensor owes a licensee no duty except not to harm him willfully or wantonly.[2] An invitee is commonly defined as one who enters upon premises for the benefit of the occupier or owner.[3] One who enters upon land for his own convenience, pleasure, or benefit is classified as a licensee.[4] Mrs. Bishop's status cannot be included within either of these definitions, because it cannot be said that she walked into the pipe for the benefit of the defendants or for her own convenience, pleasure, or benefit.

The rising flood of tort cases in recent years has presented other situations in which the previously mentioned definitions of licensee and invitee do not apply to persons lawfully on the premises of another. Attempts to establish a supplementary standard which would separate licensees from invitees in such a way that would justify the higher duty of care to an invitee has resulted in the application of the doctrine of foreseeability. It is reasonable to foresee that an invitee is more likely to enter the premises than a licensee. It is also reasonable to say that one owes a higher duty to keep the premises in a safe condition for an invitee, who is more likely to come upon the premises, than to a licensee whose presence is not as probable. It has been submitted that the true test of a property owner's liability is not the nature of the landowner's conduct, but the existence of grounds for anticipating another's presence,

[1]Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240, 191 N.W. 99 (1922).

[2]Robinson v. Leighton, 122 Me. 309, 119 Atl. 809 (1923); Austin v. Baker, 112 Me. 72, 75 Atl. 1005 (1914); Stanford v. Clancey, 106 Me. 72, 75 Atl. 293 (1909); Fleckenstein v. Great A & P Tea Co., 91 N.J.L. 45, 102 Atl. 700 (1910).

[3]Prosser, Torts § 78 (2d ed. 1955).

[4]Bennett v. Louisville & N.R.R., 102 U.S. 577 (1880); Branan v. Wimsatt, 298 Fed. 833 (D.C. Cir. 1924); Brosnan v. Koufman, 294 Mass. 495, 2 N.E. 2d 441 (1936); Pettyjohn v. Basham, 126 Va. 72, 100 S.E. 813 (1919); Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1937).

so as to require the taking of reasonable precautions for his safety.[5] The degree of care that is reasonable is determined by the probability that a person will take a particular path,[6] at a particular time of day.[7] Firemen and policemen are universally held to be licensees, and yet they clearly come on the owner's premises for his benefit, and the invitation is clear since they come in response to his call for help. The distinction must be in the fact that firemen and policemen are likely to enter at unforeseen times, upon usual parts of the premises, and under circumstances of emergency where care in preparation cannot be reasonably anticipated.[8] In the *Kennedy* case,[9] a water meter inspector's recovery for injuries was based not only upon the ground that he was an invitee, but also upon the general ground of foreseeability of injury. An owner of unfenced land within 100 to 120 feet of a passing highway was not held responsible for the death of two children who entered the land and swam in a poisonous pool, because there was no reason to anticipate anyone swimming in the pool.[10] In the noted case, the Court concluded, after considerable difficulty, that Mrs. Bishop was a licensee since she used the path for her own convenience. It seems that the court could have more properly reached the duty of care owed Mrs. Bishop by examining the foreseeability that she would stumble upon the stacked pipe.

Walker L. Watters

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5 38 Am. Jur., Negligence § 104 (1958 supp.).

6 Olderman v. Bridgeport City Trust Co., 125 Conn. 177, 4 A.2d 646 (1939).

7 Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914).

8 Sherman v. Maine Cent. R.R., 110 Me. 228, 85 Atl. 755 (1913).

9 Boneau v. Swift & Co., 66 S.W.2d 172 (Mo. 1934); Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W. 2d 549 (1951).

10 Kennedy v. Heisen, 182 Ill. App. 200 (1913).

RECENT BOOKS

THE LION AND THE THRONE

The Life and Times of Sir Edward Coke (1552-1634).
By Catherine Drinker Bowen. Boston: Atlantic-Little, Brown.
1957: $6.00: pp. 652

An objective observer from outer space must certainly be struck by the mundane experiences of our contemporary materialism and especially the frequent preoccupation of our calling with the inadequacies or excess of the "adequate award." It is, therefore, a refreshing opportunity to disgress and look again at the fascinating period of legal history covered by "The Lion and the Throne."

Here we find the romantic adventure that was the life of Sir Edward Coke unfolded in lively narrative. A man successively Attorney General, Speaker of Commons, Chief Justice of the Common Pleas, and Chief Justice of the King's Bench during this formative period of the common law certainly merits our careful consideration. In this delightful biography we relive his preparation for the law, his remarkable success in private practice and his rapid rise in public office. We learn of his spirited struggles with the Crown, his courtships, his successively happy and disastrous marriages, his constant rivalry with Bacon, his keen interest in legal scholarship, his influential literary legacies, and his untiring work as elder statesman in Parliament during his twilight years.

The biography of this trial lawyer who was also an advocate in Shelly's Case and prosecutor in the celebrated treason trials of Raleigh, Essex, and the conspirators in the Gunpowder Plot, is bound to be of interest to the lawyer of today. Without antiquarian inclination one can yet enjoy a rewarding experience in revisiting this tumultuous period. The timeless struggle of the Individual vs. the State that gives us such concern today was never more real than during this period of conflict over the royal prerogative and supremacy of the common law.

We can marvel along with future generations that this stalwart barrister could courageously stand up against a totalitarian monarch and defiantly quote the ancient learning of Bracton: "non sub homine, sed sub Deo et Lege"—not under man but under God and the Law.[1] In our own time when conformity seems to be regarded as such a virtue, we can yet pause for a grateful moment to recognize the integrity and independence of this lawyer who subordinated his personal interests to higher goals. Whatever else might be said, his was not a philosophy of expediency.

Edward Coke has long been recognized as one of the truly great men of the law. Yet he had his full measure of human failings, and there are periods in his life as well as particular courses of conduct that we cannot admire. As one eminent scholar has summarized Coke's place in legal history:

"Full of patriotism and national pride, Coke shared the feelings

[1]Page 305.

> of others of his contemporaries who exalted the idea of the State, and displayed a violent hatred of Roman Catholics and political prisoners. Even contemporaries sometimes felt that he exaggerated a little, while his prosecution of Raleigh overstepped all bounds and was conspicuous among the State trials even at this period for its brutality . . . . His general influence upon the course of English law was to maintain continuity between modern and medieval times, and this achievement had vices as well as virtues. But, most important of all, he preserved the fabric of the common law, and in his judgments began the tendency towards bringing it into harmony with more modern needs."[2]

Fortunately, Catherine Drinker Bowen does not idolize her subject but faithfully records the bitter with the sweet. She paints a remarkably detailed picture of a great man and breathes life into him as a human being, full of drive and ability, sometimes misguided, sometimes afflicted with acute astigmatism towards the viewpoints of others. One wonders that a lawyer so steeped in the traditions of the adversary system of the common law, in considering two or more sides of an issue, could yet so completely close his mind on questions of politics and religion. Perhaps we do the man an injustice to expect more of him, however, and to judge him by later standards of enlightenment.

The author of this work has performed an admirable task of research and scholarship. Footnotes documenting the text cover more than a hundred pages at the end of the book. Not content merely with the reports of others, Mrs. Bowen visited England to examine many original sources and records. She visited the Inns of Court, Westminster Hall, and places in the countryside frequented by Coke to collect firsthand information for this book. More than six years were consumed in its preparation.[3]

Mrs. Bowen is not a lawyer but has written two earlier and highly successful biographies of great men of the law—"Yankee from Olympus" (on Justice Oliver Wendell Holmes) and "John Adams and the American Revolution." She has handled the technical phases of these works with remarkable skill.

If one wonders how this Pennsylvania housewife should move backward through legal history from Holmes to Adams to Coke, she gives us a ready answer. She first became interested in government and the Constitution and was directed to the life and writings of Justice Holmes. In tracing the heritage of Justice Holmes, she was led back to the American Revolution and its issues of justice and individual liberty, from all of which came the John Adams book. That trail naturally took her thence to England and our heritage of the common law.

In her own words she tells us how she chose Coke from among the many figures of English common law:

> "Coke's name presented itself quite naturally as a rounding out, carrying the story of our form of free government back to Eng-

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[2]Plucknett, A Concise History of the Common Law (2nd Ed. 1936) pp. 217, 219.

[3]The New York Times, March 10, 1957, § 7, p. 1.

land, where it had its inception . . . . Sir Edward Coke never set foot on American soil. Yet no United States citizen can read his story without a sense of immediate recognition. In these parliamentary struggles, knights, citizens and burgesses fought not for themselves alone but for states as yet unformed: Pennsylvania, Virginia, California. In Westminster courtroom battles over procedure, jurisdiction, 'right reason and the common law,' constitutional government found its way to birth. When the time came we changed the face of this English constitution; amid the sound of guns, we repudiated what we hated, adapted what we liked. Yet the heritage endured."[4]

While one can enrich his appreciation of this great heritage in reading such a biography, the reader need not be discouraged about the prospect of difficult or ponderous reading. Mrs. Bowen's style is light and readable. Her descriptions are not burdened with irrelevant details. Better than most fiction are her accounts of the courtships of Coke and his rivalry with Bacon for the hand of the charming Lady Hatton, beautiful, young, rich, available widow.

Without reservation I can heartily recommend this fine work to all of the Mississippi Bar who seek a better understanding of our heritage in the common law of our English cousins.

Herman B. DeCell
Attorney At Law
Henry & Barbour
Attorneys At Law
Yazoo City, Mississippi

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[4]Preface, pp. ix, x.

FEDERAL TAX FRAUD LAW

By Ernest R. Mortenson, Indianapolis, Ind.:
The Bobbs-Merrill Co. Inc. 1958. pp. 295. $12.50

The reviewer recommends this publication as an absolute "must" for all general practitioners. Not since Stanley and Kilcullen wrote *The Federal Income Tax,* has a treatise on any phase of tax law been so clearly and so simply written. The points brought out by the author should be clearly understood by anyone with a general legal background even though he may be completely lacking in technical accounting knowledge. Furthermore, the subject is one which the general practitioner can no longer ignore. While the accountants may handle the accounting phases of income tax reporting, they are neither qualified technically nor legally allowed to handle those cases where the federal government asserts an intent on the part of the taxpayer to defraud the government of its just revenues.

This is the age of taxation, particularly taxation of incomes. With the constantly increasing scope and magnitude of federal government operations, and the incessant search for more revenue with which to support them, the rates of tax upon incomes have risen so steeply that citizens have occasionally resorted to questionable tactics in reporting their net taxable income to the Internal Revenue Service in order to reduce the amounts payable. Sometimes these tactics are deliberate attempts to falsify the correct amount of income receipts or allowable deductions therefrom, but often are actually practices which, in business transactions, are considered ordinary and normal under the well-established rule of "caveat emptor" which prevails therein. In any case, however, the natural desire of the revenue collecting agencies to increase their production has led to a much closer scrutiny of income tax returns and a growing attempt on the part of government agents to penalize questionable failures, to correctly report income and deductions, and to prosecute taxpayers criminally wherever it appears that the government has any chance of success. The income tax fraud statutes, which at the time of their original passage by Congress were actually intended to be used only against racketeers and other known criminals, have now become one of the government's foremost weapons in the collection of its revenues. Every lawyer, regardless of his preference as to type of practice, is now faced with the probability that he will be forced many times in his career to defend a client against a charge of tax fraud, thus he must at all times be sufficiently aware of the possibilities of a tax fraud charge as a consequence of the performance of ordinary legal matters. The general practitioner should know when to associate some other attorney who has the advantage of specialized training in this field.

The author points out in his introductory chapter that experienced legal counsel is not only desirable but often necessary at the very beginning of a tax investigation where there is the slightest possibility of any misunderstanding as to the client's intent as shown by his income tax report. He shows the many different avenues by which the government may obtain information or evidence of a fraudulent action

and the fine line which often separates the assertion of an ordinary tax deficiency from a charge of fraud. Throughout this chapter and the remaining nine chapters of the book, he assumes that the reader is a general practicing attorney with very little knowledge of, and a great distaste for, the technical aspects of income tax practice. Consequently, the author words his statements in such a manner that such lawyers may clearly understand the principles set forth.

The substantive content of the book is set out in the best possible sequence. Chapter Two covers the manner in which a tax fraud case is developed. Mr. Mortenson illustrates how fraud cases may originate through routine investigations, information of other government agencies, or from informers; how the investigations are made when fraud is suspected, and the agencies which handle a case up to the point of actual criminal indictment, or the assertion of a 50% fraud civil penalty. Some of the pitfalls into which a taxpayer may be trapped are brought out by a hypothetical fraud case in simple, clear, and precise language, with schedule illustrations inserted for explanation.

In the next chapter, the author goes into detail regarding the question of cooperation with the government's agents. The rights and privileges of the taxpayer against forced cooperation and the possible waiver of such privileges are discussed along with the authority of the government agents to compel testimony and the production of records. As the criminal aspects of a fraud case cannot be compromised by mere payment of the taxes and civil penalties, and since the Treasury Department has abandoned the old rule regarding a voluntary disclosure of tax evasion activities, there is a real need for proper representation.

The next chapter deals specifically with the actual criminal sanctions. The author gives a lucid explanation of the elements necessary to support a fraud charge, and shows the application of these elements in various factual situations. He brings out the fact that there are several different penal provisions in the Internal Revenue Code, and that a taxpayer's conduct may constitute a violation of one sanction where it is not sufficient to be a violation of another. The difference between the felony statute and the misdemeanor statute and how the distinctions might be used to a defendant's advantage are discussed. In addition, there is an ample discussion of conspiracy and the periods of limitation on criminal prosecutions.

Chapters Five and Six are concerned with questions of evidence in tax fraud cases. These chapters are particularly important since some of the types of evidence used in tax cases may seem, to a general practitioner unfamiliar with them, to be almost beyond the bounds of comprehension. For instance, use of the net worth method, the expenditures method, the bank deposits method, and occasionally any combination of the three, do not seem in any way to comply with the requirements of the Internal Revenue Code for determining taxable income for a particular year for which the tax rate is to be levied. Furthermore, as the author shows, a change by the Commissioner in the taxpayer's method of accounting will often indicate a substantial deficiency where actually none exists. Nevertheless, these types of indirect proof of taxable income are accepted as sufficient to sustain a con-

viction of fraud even though they are susceptible to many miscalculations. Mr. Mortenson's discussion of them, which includes the quantum of proof and the question of corroboration of the calculations is well stated, and easily understood. In these chapters he also gives a clear explanation of the quantum of proof required and of specific evidentiary problems in tax cases—including official documents, book and records, the use of work papers, charts and summaries, and even of the occasional use of the taxpayer's spouse as a witness, directly or indirectly.

Chapter Seven deals with the framework of a criminal tax trial, including all of the procedural aspects, both before, during and after the trial. There is an excellent discussion of the problems surrounding the question of trial by jury and its desirability.

The outline of an actual trial of a criminal tax case is contained in Chapter Eight, together with a particularly fine discussion of the accountant's role during a trial. The author not only shows generally how the accountant may assist the defense attorney, but even lists ten specific questions to which the accountant's attention should be directed—which would be of great help to the attorney. The order of proof in a fairly characteristic net worth case is listed numerically for the reader's attention and many excerpts of testimony based on hypothetical cases are included.

In Chapter Ten the civil penalties are well covered, with a clear distinction being drawn between the civil fraud penalty and those for negligence, failure to file a return, failure to estimate or pay estimated tax, and for failure to collect and pay over tax as required by statute. Since these are the problems with which the average attorney will deal practically all of the time, this is the longest chapter in the book, and it contains a very clear and concise explanation of the indicia of civil fraud and the defenses against a charge thereof.

The author concludes his treatise with a chapter on collection procedures showing the rights of the government to proceed against property of a delinquent taxpayer either by summary procedure or by civil process in the district court. The methods of contesting assessments, injunctive relief and compromise offers, as well as the general procedural method of appeal from the lower courts are discussed. In addition, there are nine paragraphs dealing with the procedure for making refund claims for overpaid taxes. While Mr. Mortenson's coverage of the various general rules dealing with tax fraud cases is comprehensive, this book is not intended to be used as a sole source of information for those attorneys dealing with tax fraud cases, but could be used for preliminary research. Every paragraph dealing with a subject is well documented with citations to the leading cases on that particular point, and the references to the Internal Revenue Code and Criminal Code Sections on both substantive and procedural matter are invaluable. Despite the fact that this reviewer has had specialized training in this field, this book will occupy a favored position for quick reference in the future.

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TIMBER AND FOREST PRODUCTS LAW

By: Harry W. Falk, Jr.—Berkeley, California
Howell-North. 1958. $7.50. pp. 348.

The timber and forest products industry in the State of Mississippi has increased in the past few years to the point where it is now the leading income producing industry. This rapid growth to the number one spot can not be expected to taper off, and most people in the industry believe it will continue to rise in importance. As the industry increases there is an increasing need for competent legal advice. With this thought in mind, I recommend this book as truly a time saver.

This book was over ten years in preparation. There is only one other book on this subject, and that was published over thirty years ago. This publication cites and analyzes *all* post World War II cases involving the subject; *all* annotations on the subject in ALR; *all* articles published since 1925 in all American legal periodicals. There are over thirty-five Mississippi cases cited—through 98 So.2d 122 (Nov. 11, 1957). The author does not merely give the syllabus notes of cases but analyzes them and after so doing does not hesitate to disagree and give his reasons. The index of this book is excellent, and certainly in the legal profession quite often the index is the most valuable part of a book.

There are twenty-four chapters in this book, some of which would be of special interest and apply primarily to loggers, manufacturers, foresters and tree farmers. However, the balance of the book is of special interest to the practicing attorney. One chapter outlines the special rules of law for timber and forest products within each state. There are four chapters concerned with damages arising from timber operations which will enable the attorney to accurately determine the the amount of damages in a given case through presentation of the legal principles involved with terminology of the forester or layman. In this era of Government control and taxation, the chapters in the book pertaining to these subjects will be extremely helpful.

Almost half of the book is devoted to the meaning and interpretation of timber contracts and the terms used therein. The author does not conclude the book with a set of forms applicable only to his home state as is so often found. Instead, he provides the attorney with an entire chapter devoted to a check list of contract provisions. From this check list the attorney can protect the interest of his client and adapt contracts that will cover the situation at hand whether he be drafting the contract or approving one drafted by another.

In this day of increased timber importance, the practicing attorney will have timber problems, and the time saved through the use of this book as a complete and ready reference will more than pay for the book on its first use.

The author says, concerning the purpose of his book, "Few attorneys know much about timber, and few people dealing in timber or

other forest products know much about law. This book is designed to breach the gap and permit both to better cooperate with each other." In my opinion his purpose was accomplished.

George D. Warner, Jr.
Attorney At Law
Meridian, Mississippi

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